No. 75-649

In the Supreme Court of the United States

OCTOBER TERM, 1975

F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, PETITIONER

v.

ARLENE MATTERN, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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CITATIONS

595-380—73——1

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v.

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The Solicitor General, on behalf of the Secretary of Health, Education, and Welfare, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 519 F. 2d 150. The opinion and order of the district court (App. C, *infra*) are reported at 377 F. Supp. 906.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*) was entered on June 3, 1975. On August 21,

1975, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including October 1, 1975. On September 23, 1975, Mr. Justice Brennan further extended the time for filing the petition to and including October 31, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court lacked jurisdiction to hear this case.

2. Whether the Due Process Clause requires that an oral hearing be held before, rather than after, a Social Security beneficiary's payments are reduced in order to recoup an erroneous overpayment.

CONSTITUTIONAL AND STATUTORY PROVISIONS AND REGULATIONS INVOLVED

The Fifth Amendment of the Constitution provides in pertinent part:

> No person shall be * * * deprived of * * * property, without due process of law * * *.

Section 204 of the Social Security Act, 49 Stat. 624, as amended, 42 U.S.C. 404, and the regulations of the Department of Health, Education, and Welfare, are set forth in pertinent part in Appendix D, *infra*.

STATEMENT

1. Section 204(a)(1) of the Social Security Act, 42 U.S.C. 404(a)(1), provides that in the event of an erroneous overpayment to a Social Security beneficiary, "proper adjustment or recovery shall be made, under regulations prescribed by the Secretary [of Health, Education, and Welfare] * * * [by] decreas[ing] any payment under this subchapter [relating to old-age, survivors, and disability insurance] to which such overpaid person is entitled." Section 204(b) of the Act further provides, however, that "there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience." This case concerns the constitutional validity, under the Due Process Clause, of the procedures used by the Secretary in enforcing and giving effect to these statutory provisions.

Under the Secretary's procedures, once the Secretary has initially determined that an overpayment has been made, the recipient is notified of the determination and given an opportunity to contest the determination in writing and, in addition or in the alternative, to request that the Secretary waive recovery in accordance with Section 204(b) of the Act. He is invited to discuss his case with the local Social Security office. See 20 C.F.R. 404.907–404.913; App. D. *infra,* pp. 69a–72a. Adjustment or recovery is deferred pending review of the initial determination. Sections 5503.3 and 5503.5 of the Social Security Claims Manual; App. D, *infra,* pp. 67a–69a. If the Secretary decides upon review that the initial determination of an overpayment was correct and that waiver of recovery is not warranted, recovery is effected by decreasing the beneficiary's subsequent monthly benefit payments until

the overpayment has been recouped, as provided by Section 204(a)(1) of the Act.

Following the Secretary's decision upon this initial review, the beneficiary is entitled to further administrative review, including a full evidentiary hearing. 20 C.F.R. 404.917; App. D, *infra,* p. 73a. If, following the hearing, it is determined that there had been no overpayment, or that the beneficiary was entitled to waiver of recovery, the beneficiary's withheld payments are repaid and his subsequent payments restored to the appropriate level.

2. Respondent, Arlene Mattern, is a recipient of disabled widows' benefits pursuant to Section 202(e)(1)(B)(ii) of the Act.[1] Her period of disability commenced May 18, 1971, and her entitlement to benefit payments commenced in December 1971, due to a statutorily prescribed six-month waiting period.[2] Payment was, however, delayed pending reconsideration of her application for benefits.

On January 14, 1972, respondent informed her local Social Security district office that she was in financial distress and requested immediate payment of benefits.[3] At that time the district office records erroneously indicated that respondent was entitled to benefits as of May 1971. The district office accordingly

[1] The facts are set forth in the opinions of the court of appeals (App. A, *infra*, pp. 5a–7a) and the district court (App. C, *infra*, pp. 42a–43a).

[2] The Act has since been amended to provide for a five-month waiting period. 42 U.S.C. (Supp. III) 423(c)(2).

[3] The Social Security Claims Manual, Section 5860 *et seq.*, provides for expedited handling of cases where prompt action is necessary to meet the essential needs of the claimant.

forwarded respondent's request to the regional office (the Philadelphia Payment Center), which certified payment to Mrs. Mattern for $1063.80—an amount covering the period from May to December 1971.

Mrs. Mattern was advised of the forthcoming special payment in a letter of January 28, 1972. That letter also stated that a possibility existed of duplicate payments, and that if she received more than one check, she should return one of them to the district office. Prior to receipt of either this explanatory letter or the special payment, Mrs. Mattern received her first regular monthly benefit payment of $119.30, on about January 26, 1972.

District office records indicate that Mrs. Mattern's sister called the office on the latter date; she was advised that the check for $119.30 was correct and that the forthcoming special payment of $1063.80 was incorrect and should be returned. The records also indicate that a district office representative telephoned Mrs. Mattern on January 28, 1972, and advised her that she was not entitled to the special payment and should return it. Mrs. Mattern did not return the check and denied receiving any phone call advising her to do so.

On July 14, 1972, the Secretary notified respondent that an overpayment had been determined and that her future benefit payments would be withheld until the overpayment was recouped.[4] Respondent was further informed that she was entitled to contest the Sec-

[4] The Secretary ultimately decided instead to recoup the overpayment by reducing future benefit payments by $30.00 per month. See 20 C.F.R. 404.502(c).

retary's finding of an overpayment or to request the Secretary to waive the overpayment if she was not at fault in receiving it and recoupment would cause her serious financial hardship or be unfair for some other reason; she was advised to submit any available documentary evidence with her written request. Respondent was informed that unless she sought reconsideration or waiver within 30 days, recoupment would begin.

On August 7, 1972, respondent requested the Secretary to waive recovery of the overpayment, contending that she had received no telephone call advising her of the incorrect payment, and that she was, therefore, without fault in cashing it.[5] The Secretary rejected her allegation of lack of fault, finding, *inter alia,* that she had been informed of the impropriety of the payment by telephone on January 28, 1972.[6] The Secretary adhered to this determination upon review.

Respondent did not request further administrative review, in which she would have been entitled to a full evidentiary hearing under the Secretary's regulations. Instead, on December 29, 1972, respondent commenced this suit as a class action in the United States District Court for the Eastern District of Pennsylvania, contending that the Secretary's pro-

[5] Respondent also alleged that recovery would cause her hardship. The Secretary has not disputed that allegation.

[6] The Secretary also concluded that the portion of the January 28 letter advising respondent of the possibility of duplicate payments should have put her on notice that she had received an incorrect payment, in view of her earlier receipt of the monthly benefit check of $119.30.

cedures for recovering overpayments fail to provide due process since they do not afford claimants a pre-recoupment oral hearing. The district court determined that it had jurisdiction under the Mandamus Act, 28 U.S.C. 1361, and certified the case as a class action on behalf of the class of "all persons eligible for Social Security OASDI benefits within the * * * Eastern District of Pennsylvania, whose benefits may be terminated, reduced or otherwise adjusted in order to recoup an over-payment" (App. C, *infra,* p. 65a). Relying on *Goldberg* v. *Kelly,* 397 U.S. 254, the district court declared the Secretary's recoupment procedure unconstitutional and enjoined the Secretary from recovering the overpayment that had been made to respondent until she had been given "an opportunity to present her case at a hearing" (App. C, *infra,* p. 64a). The injunction was later extended to the other members of the class.[7]

[7] The district court's order of June 10, 1974, permanently enjoining the recoupment of overpayments before a hearing, provided that the order would not apply to the following persons:

(a) beneficiaries presently residing in the Eastern District of Pennsylvania whose claims are not serviced by the Philadelphia program center, unless the names of such persons are specifically brought to the attention of the defendant and his agents and attorneys;

(b) beneficiaries who have received an administrative recoupment hearing between January 1, 1973 and April 30, 1974, and who have waived their right to further appeal;

(c) beneficiaries who have not requested an administrative recoupment hearing, between January 1, 1973 and April 30, 1974, following a final reconsideration and administrative determination to recoup benefits and notification of the right to request such hearing.

The injunction as to the class was stayed pending appeal.

The court of appeals affirmed the district court's holdings with regard to jurisdiction and the propriety of class relief, and also agreed that the Secretary's recoupment procedures are unconstitutional, but vacated and remanded the case to the district court for the entry of a more limited order that would require a prior oral hearing [8] only in situations where the Secretary's decision might turn upon the credibility of witnesses.[9] The court of appeals determined that this was such a case, for respondent's claim that she was not at fault rested upon her denial that she had received the telephone call advising her that she was not entitled to the special payment and should return it.[10]

[8] In describing the type of hearing required, the court of appeals emphasized that "the pre-recoupment hearing need not take the form of a judicial or quasijudicial trial" (App. A, *infra*, p. 35a). The court identified seven essential elements of such hearings, including "an opportunity for all parties to receive and challenge the decision maker's report before it becomes final" (*id.* at 36a–37a).

[9] For purposes of convenience, the court distinguished two categories of overpayment disputes, "reconsideration" cases and "waiver" cases. The former generally involve the correctness of the Secretary's determination that an overpayment has occurred (*e.g.*, whether the computation of an earnings statement is correct, or whether two benefit checks have been received rather than one), and ordinarily can be resolved by analysis of documentary evidence. In "waiver" cases, however, issues of credibility are often involved in determining a claimant's allegation of lack of "fault" in receiving an overpayment. The court determined, however, that the constitutional necessity of a prior hearing turns upon the particular facts of each case and not upon whether the case is one of "reconsideration" or "waiver" (App. A, *infra*, pp. 29a–36a).

[10] On October 1, 1975, subsequent to the decision below, the Ninth Circuit, in the consolidated cases of *Elliott* v. *Weinberger*, No. 74–1611, and *Buffington* v. *Weinberger*, No. 74–3118, held the Secretary's pre-recoupment procedures unconstitutional on grounds similar to those relied upon by the court of appeals in the instant case and sustained an injunction entered by the district court restraining the Secretary from enforcing his regulations throughout the nation with respect to old age and survivors' benefits (with the exception of the Eastern District of Pennsylvania, which is involved in this case). The effect of the rulings in the instant case and in *Elliott* and *Buffington* is to subject the Secretary to a nationwide injunction against recovering overpayments without first affording beneficiaries a pre-recoupment oral hearing. The government intends to file a petition for a writ of certiorari in those cases.

REASONS FOR GRANTING REVIEW

This case raises questions similar to those now before the Court in *Mathews* v. *Eldridge*, No. 74–204, argued October 6, 1975. As in *Eldridge*, the district court's assertion of jurisdiction here is inconsistent with this Court's decision in *Weinberger* v. *Salfi*, No. 74–214, decided June 26, 1975. Also as in *Eldridge*, although the competing factors to be weighed here may be somewhat different, the court of appeals' decision on the constitutional merits represents an unwarranted and improper extension of the rule of *Goldberg* v. *Kelly*, 397 U.S. 254, to the Social Security program and, if not reversed, would impose a substantial and costly burden upon the administration of that program that would be wholly disproportionate to the relatively insubstantial private interests that would thereby be served.

1. This Court in *Salfi* held that the district courts have no jurisdiction over claims, such as respondent's, arising under Title II of the Social Security Act, "save as provided [by Section 205(g) of] the Act"

(slip op., p. 6). In turn, Section 205(g) confines the courts' jurisdiction to "any final decision of the Secretary made after a hearing * * *." The interim decision of the Secretary sought to be reviewed here—the order reducing respondent's monthly payments pending further administrative review—was not a "final decision of the Secretary," nor was it made "after a hearing."

Respondent could have obtained administrative review of the Secretary's interim decision, and a full evidentiary hearing would have been afforded at that final review stage. It is the Secretary's final decision at that stage, and not his intermediate decision challenged here, that is judicially reviewable under Section 205(g). We have elaborated upon this question in our supplemental and reply brief, and our separate reply brief, in *Eldridge,* and also in our brief in *Norton* v. *Mathews,* No. 74–6212, question of jurisdiction postponed until the hearing on the merits, June 30, 1975, upon all of which we rely here.[11]

2. The Secretary's present procedures governing the recovery of Social Security overpayments provide a fair and reliable basis for determining whether an overpayment has been made and, if so, whether recovery should be waived. The social costs entailed by the requirement of a pre-recoupment evidentiary hearing would significantly outweigh any social benefits

[11] Copies of these briefs are being furnished to respondent's counsel.

that would accrue from such a requirement. Accordingly, the Secretary's procedures afford due process and should be sustained.

a. *The present procedures are fair and reliable.*

The Secretary's pre-recoupment procedures afford the beneficiary an ample opportunity to present his case and avoid any improper reduction of benefits in the vast majority of cases. The process begins with an initial determination by the Secretary that an overpayment has been made. The beneficiary is notified by mail of the determination, and is advised of his right to request reconsideration or waiver. If the beneficiary responds within 30 days, recoupment is deferred until the Secretary has acted on the request.[12] In seeking reconsideration or waiver, the beneficiary may consult personally with officials at the Social Security district office, which is generally located near his home. The beneficiary may also include whatever documentation he wishes in support of his claim, and printed forms are made available to facilitate the presentation of the beneficiary's case.

It is only after the Secretary has made a full evaluation of the beneficiary's case, and has adhered to his initial determination that recoupment is appropriate, that the process of recovering the overpay-

[12] Any objection at all within the 30-day period is sufficient to postpone recoupment. Even if the beneficiary does not make a request for reconsideration or waiver within that period, any such request made within six months will result in a resumption of benefits until the request has been acted on (App. D, *infra*, pp. 67a–69a, 71a).

ment actually begins. As soon as the beneficiary is advised of the Secretary's determination, he may request a full evidentiary hearing with respect to his claim.

This procedure assures that the beneficiary knows the basis for the Secretary's proposed action and enables the beneficiary to present his objections to that action before it is taken. Although these objections must be submitted in written form, the beneficiary can discuss his case with local Social Security officials, who are responsible for assisting him in providing all the information necessary to evaluate his case. Finally, any beneficiary who is still dissatisfied with the Secretary's decision upon initial review has the right to a full evidentiary hearing after recoupment has started. If the Secretary's decision is reversed after that hearing, the beneficiary receives full restitution of any benefits previously withheld.

These procedures, we submit, adequately protect the beneficiary's interest in avoiding improper reduction of payments. The court of appeals' decision to the contrary rests in large part upon the assumption that requests for waiver, made on the ground that the recipient was not at fault in receiving the overpayment and that recoupment would defeat the purposes of the act or be inequitable, cannot be properly evaluated, even as a preliminary matter, without a prior oral hearing to resolve questions of credibility. Two factors, however, actually underscore the essential fairness of the Secretary's procedures in such cases.

First, the beneficiary can personally appear before and consult with the local Social Security officials who are responsible for developing the facts concerning his claim (App. D, *infra,* pp. 68a–69a). Thus, the beneficiary does in fact have an opportunity for a pre-recoupment face-to-face confrontation with officials who may evaluate his credibility in the course of gathering the facts necessary for regional office review. Second, waiver cases by definition involve situations in which the beneficiary acknowledges that he was not entitled to receive the payment but requests the Secretary to forgive repayment. In such circumstances, the Constitution does not bar the Secretary from proceeding to collection, subject to a possible return of the moneys if the beneficiary's equitable contentions are sustained upon a subsequent oral hearing. Cf. *Arnett* v. *Kennedy,* 416 U.S. 134, 150–158; *Mitchell* v. *W. T. Grant Co.,* 416 U.S. 600.

b. *The social costs of granting pre-recoupment oral hearings would significantly outweigh any social benefits of such a procedure.*

The adverse impact upon the Social Security Administration of the decision here may well exceed that of the court of appeals' decision in *Eldridge.* Approximately 1,250,000 overpayments are made each year.[13] To require an oral hearing before recoupment in any significant percentage of these cases would

[13] In contrast, approximately 33,500 decesions that disability has terminated are made each year (*Eldridge* Supp. and Reply Brief, p. 14, n. 7).

significantly increase the complexity and cost of the administrative process without any comparable offsetting advantages. Cf. *Richardson* v. *Perales,* 402 U.S. 389. For not only will the additional hearings be extremely costly, but the risk of unrecoverable overpayments will increase.

We estimated that slightly more than 9,000 hearings a year are at stake in *Eldridge* (*Eldridge* Supp. and Reply Brief, p. 18); a substantially larger number may be at stake here. There are currently approximately 50,000 waiver requests annually, of which roughly half ordinarily are granted. Of the 25,000 which are denied, it is impossible to say with any precision how many involve issues of credibility. In any event, in view of the volume of cases involved, it is not feasible to make a case-by-case review to determine whether a hearing is constitutionally necessary under the standards established by the court of appeals. Therefore, under the compulsion of the outstanding injunctions in *Buffington* and *Elliott* (see note 10, *supra*), the Secretary is informing all overpaid beneficiaries that upon request they will receive an evidentiary hearing before recoupment is initiated.

The Secretary has not yet analyzed the response to the new procedure, but any substantial increase in the number of hearings held will entail a significantly increased expenditure of funds and employment of

manpower to conduct these proceedings. In addition, prolonging the pre-recoupment period probably will increase the losses incurred as a result of unrecovered overpayments, which in fiscal year 1971 alone amounted to 5 million dollars.[14]

In contrast, individual beneficiaries who are determined to be entitled to waiver are unlikely to benefit appreciably from the more elaborate and expensive procedures required by the courts below. Under the Secretary's regulations, such beneficiaries are made whole for any incorrect pre-hearing recoupment by the simple expedient of a return of the recouped moneys. Moreover, the impact of a pre-hearing recoupment order upon such a beneficiary is unlikely to be severe, for the Secretary adjusts the amount deducted from a beneficiary's monthly payment to alleviate severe financial need.[15] The pre-hearing economic impact on the individual is thus even less here than where the Secretary orders the interim termination of disability benefits as in *Eldridge.*

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[14] The delay will be greater, and the effect therefore more severe, if the beneficiary must be accorded an opportunity to object to a proposed decision before it becomes final (see note 8, *supra*). No such opportunity is required either by *Goldberg* v. *Kelly*, *supra*, or by the Ninth Circuit's decision in *Buffington* and *Elliott*.

[15] The regulations permit repayment of as little as $10 a month, 20 C.F.R. 404.502(c). The monthly deductions here were adjusted to $30 a month so that recovery of the total amount would be achieved over 36 months.

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CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1975.

APPENDIX A

United States Court of Appeals, Third Circuit

No. 74–1776

ARLENE MATTERN, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, APPELLEE
v.
CASPAR W. WEINBERGER, SECRETARY OF HEALTH, EDUCATION AND WELFARE, APPELLANT

Argued January 24, 1975; Decided June 3, 1975

Before VAN DUSEN, GIBBONS AND HUNTER, Circuit Judges.

Opinion of the Court

HUNTER, Circuit Judge:

This appeal involves a challenge to the constitutionality of the procedure established by the Secretary of Health, Education and Welfare, pursuant to section 204 of the Social Security Act,[1] for the recoupment of

[1] 42 U.S.C. § 404 (1970):

"(a) Whenever the Secretary finds that more or less than the correct amount of payment has been made to any person under this subchapter, proper adjustment or recovery shall be made, under regulations prescribed by the Secretary, as follows:

"(1) With respect to payment to a person of more than the correct amount, the Secretary shall decrease any payment under

alleged overpayments of benefits. The district court, 377 F. Supp. 906 (E.D.Pa., 1974), found the recoupment procedure violative of due process since it permitted an adjustment or reduction of social security payments without affording the beneficiary the right to a prior oral hearing. While we are in substantial agreement with the opinion of the district court, we vacate and remand for entry of a new order consistent with this opinion.

I. Recoupment Procedure

Section 204(a) of the Act directs the Secretary to recover overpayments of social security benefits through recoupment of future benefit payments. Section 204(b), however, requires the Secretary to "waive" recoupment under certain circumstances. It provides that there shall be no recoupment where the overpaid beneficiary is "without fault"[2] and the recoupment either would "defeat the purpose" of Title II of the Act[3] or would be "against equity and good conscience."[4] Pursuant to these statutory directives, the Secretary has promulgated regulations providing for a four-step process of administrative review: an

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this subchapter to which such overpaid person is entitled, or shall require such overpaid person or his estate to refund the amount in excess of the correct amount, or shall decrease any payment under this subchapter payable to his estate or to any other person on the basis of the wages and self-employment income which were the basis of the payment to such overpaid person, or shall apply any combination of the foregoing.

* * * * *

"(b) In any case in which more than the correct amount of payment has been made, there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience."

Footnotes 2 and 3 on p. 3a; footnote 4 is on p. 4a.

initial determination that there has been an overpayment and that there is no basis for waiver of recovery (20 C.F.R. § 404.905); a reconsideration of that initial

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[2] "Fault" is defined in 20 C.F.R. § 404.507, which provides:

"'Fault' as used in 'without fault' (see §§ 404.506 and 405.355) applies only to the individual. Although the Administration may have been at fault in making the overpayment, that fact does not relieve the overpaid individual or any other individual from whom the Administration seeks to recover the overpayment from liability for repayment if such individual is not without fault. In determining whether an individual is at fault, the Administration will consider all pertinent circumstances, including his age, intelligence, education, and physical and mental condition. What constitutes fault (except for 'deduction overpayment'—see § 404.510) on the part of the overpaid individual or on the part of any other individual from whom the Administration seeks to recover the overpayment depends upon whether the facts show that the incorrect payment to the individual or to a provider of services or other person, or an incorrect payment made under section 1814(e) of the Act [42 U.S.C. § 1395f(e)], resulted from:

"(a) An incorrect statement made by the individual which he knew or should have known to be incorrect; or

"(b) Failure to furnish information which he knew or should have known to be material; or

"(c) With respect to the overpaid individual only, acceptance of a payment which he either knew or could have been expected to know was incorrect."

[3] The phrase "defeat the purpose" of Title II is defined in 20 C.F.R. § 404.508, which provides:

"(a) General 'Defeat the purpose of title II [42 U.S.C. § 401 et seq.],' for purposes of this subpart, means defeat the purpose of benefits under this title, i.e., to deprive a person of income required for ordinary and necessary living expenses. This depends upon whether the person has an income or financial resources sufficient for more than ordinary and necessary needs, or is dependent upon all of his current benefits for such needs. An individual's ordinary and necessary expenses include:

"(1) Fixed living expenses, such as food and clothing, rent, mortgage payments, utilities, maintenance, insurance (e.g., life, accident, and health insurance including premiums for supple-

determination upon request by the recipient (*Id.* § 404.914); an administrative hearing *de novo* before an administrative law judge (*Id.* § 404.917); and review by the Appeals Council of the Social Security Administration (*Id.* § 404.945). Judicial review is then available, under section 205(g) of the Act, 42 U.S.C. § 405(g), to claimants who have exhausted their administrative remedies.

While a claimant thus has a right to a full evidentiary hearing at the third step in the administrative process, such a hearing is not available until *after* the recoupment process has begun. When a claimant is notified of the initial adverse determination and of

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mentary medical insurance benefits under title XVIII [42 U.S.C. § 1395 et seq.]), taxes, installment payments, etc.;

"(2) Medical, hospitalization, and other similar expenses;

"(3) Expenses for the support of others for whom the individual is legally responsible; and

"(4) Other miscellaneous expenses which may reasonably be considered as part of the individual's standard of living.

"(b) When adjustment or recovery will defeat the purpose of title II [42 U.S.C. § 401 et seq.]. Adjustment or recovery will defeat the purpose of title II [42 U.S.C. § 401 et seq.] in (but is not limited to) situations where the person from whom recovery is sought needs substantially all of his current income (including social security monthly benefits) to meet current ordinary and necessary living expenses."

[4] "'Against equity and good conscience' is defined in 20 C.F.R. § 404.509, which provides:

"Against equity and good conscience" means that adjustment or recovery of an incorrect payment (under title II or title XVIII [42 U.S.C. § 401 et seq. or § 1395 et seq.]) will be considered inequitable if an individual, because of a notice that such payment would be made or by reason of the incorrect payment, relinquished a valuable right (examples (1), (2), and (5)) or changed his position for the worse (examples (3), and (4)). In reaching such a determination, the individual's financial circumstances are irrelevant."

his right to seek reconsideration, he is given thirty days in which to submit, in writing, his reasons why he disagrees with the determination that he has been overpaid or why he seeks a "waiver" under section 204(b) of the Act. Once such a request for reconsideration or waiver has been filed, even if the thirty days has expired, the recoupment procedure is automatically deferred until such reconsideration is completed.[5] If the Secretary adheres to his initial determination, the claimant is so notified and benefits begin to be withheld. At that time, the claimant is notified of his right to seek an administrative hearing *de novo*, with the right to present oral testimony and to cross-examine witnesses. A request for an oral hearing, unlike a request for reconsideration, will not toll recoupment. While the record is not entirely clear, it appears that there is usually a delay of several months from the time benefits are first withheld to the time a claimant is able to obtain an oral hearing.

II. The Facts

At the time this suit was filed, plaintiff Arlene Mattern was fifty-three years old and physically disabled. In 1971, she applied for disabled widow's benefits pursuant to 42 U.S.C. § 402(e)(1)(B)(ii), on the social security earnings record of her deceased husband. Her application was approved, and she became eligible for benefits as of May 18, 1971, with a monthly entitlement of $119.30. Because of a mandatory waiting period of six months,[6] plaintiff was not scheduled to begin receiving payments until December 1971. How-

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[5] Social Security Claims Manual, § 5503(c).

[6] The Act has since been amended to provide for a five-month waiting period. 42 U.S.C. § 423(c)(2) (1970).

ever, when plaintiff informed the social security office that she was in financial distress, she was issued, in February 1972, a check totalling $1063.80, which covered the period from May to December 1971. This payment was improper, since it had been issued in disregard of the mandatory six-month waiting period.

Plaintiff was advised of the forthcoming special check in a letter of January 28, 1972. That letter also informed her that there was a possibility of duplication of payment and that if she should receive more than one check, she should return one of them to the social security district office. Prior to the receipt of either the special check or the January 28 letter, plaintiff had received her first monthly payment of $119.30. According to records maintained by the district office, plaintiff's sister called the office on January 26, 1972, and was told that the $119.30 check was correct but that the impending special check of $1063.80 had been erroneously issued. The records also indicate that, on January 28, a district office representative phoned plaintiff to tell her that the special check being mailed was incorrect and should be returned. Plaintiff never returned the check, and denies that she ever received a phone call instructing her to return it.

Several months later, on July 14, 1972, plaintiff was sent a letter advising her that she had received $1063.80 more in social security benefits than she was entitled to and that since she had failed to return the check an adjustment would be made in her forthcoming benefit payments. Plaintiff was also informed of the "reconsideration" and "waiver" provisions of the law. On August 7, 1972, plaintiff requested the Secretary to waive recoupment of overpayment by filing both a "refund" and a "without fault" questionnaire, in which she listed her monthly expenses and

stated that she had no other source of income, that she had been ill, that she had spent the check on her bills and that she had never received any letter or phone call advising her that the $1063.80 check had been sent in error. The district office rejected her request for waiver, on the ground that she was not without fault in causing the overpayment. In making this initial determination, the district office relied on its letter of January 28, advising plaintiff that if she received more than one check, she should return one of them. It also relied on its records indicating that plaintiff had been notified by phone on January 28 that the $1063.80 check was incorrect and should be returned.

[1] Plaintiff subsequently filed a request for reconsideration and, in accordance with the Secretary's procedures, recoupment was deferred until completion of the reconsideration. On January 3, 1973, the district office reaffirmed its initial decision, and determined that her payments would be reduced by $30 per month until the full amount of the overpayment was recovered. In the meantime, plaintiff had filed this class action in the Eastern District of Pennsylvania. As a result of a stipulation between the parties, the plaintiff has continued to receive her full benefits until final disposition of her suit. The district court declared the recoupment procedure unconstitutional, and the Secretary appeals.[7]

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[7] It appears from the record that the Secretary appealed from the wrong order. The notice of appeal indicates that he was appealing from the district court's order of April 30, 1974, which granted plaintiff's motions for a class action determination and for summary judgment, rather than from the final order of June 10, 1974, which granted injunctive relief. However, we believe that this defect is not fatal and that we can treat the appeal

III. Jurisdiction

Plaintiff asserted several bases of jurisdiction in her complaint,[8] but the district court found that only one of them was appropriate—the Mandamus Act, 28 U.S.C. § 1361 (1970).[9] Since we agree that jurisdiction is available under the Mandamus Act, we need not consider the other jurisdictional rulings made by the district court.

[2] It is well established that, in order for jurisdiction to lie in mandamus, a plaintiff must allege that the defendant owes him a clear, ministerial and non-discretionary duty. As we said in *Richardson* v. *United States*, 465 F. 2d 844, 849 (3d Cir., 1972), *rev'd on other grounds*, 418 U.S. 166, 94 S. Ct. 2940, 41 L. Ed. 2d 678 (1974):

> In order for mandamus to issue, a plaintiff must allege that an officer of the Government owes him a legal duty which is a specific, plain ministerial act "devoid of the exercise of judgment or discretion" [citations omitted]. An act is ministerial only when its performance is positively commanded and so plainly prescribed as to be free from doubt.

as having been taken from the underlying judgment. We believe that it is reasonable to infer that the intent of the Secretary was to appeal from the final judgment, and at oral argument counsel for plaintiff denied that his client had been prejudiced in any way. *See* Peabody Coal Co. v. Local Union Nos. 1734, 1508 and 1548. U.M.W., 484 F. 2d 78, 81–82 (6th Cir., 1973); Lumberman's Mutual Ins. Co. v. Massachusetts Bonding & Ins. Co., 310 F. 2d 627, 629 (4th Cir., 1962). *Cf.* Hodge v. Hodge, 507 F. 2d 87, 89 (3d Cir., 1975).

[8] 28 U.S.C. §§ 1331(a), 1343(4), 1346 and 1361 (1970).

[9] This Act provides:

"The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

The Secretary challenges the district court's holding that it had jurisdiction in mandamus on the ground that the duty which plaintiff seeks to compel is not a "ministerial act" which is "so plainly prescribed as to be free from doubt." After noting that the district court relied on *Goldberg* v. *Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed. 2d 287 (1970), in holding that due process mandated a pre-recoupment oral hearing, and after distinguishing *Goldberg* on the *merits*, the Secretary concludes that "the broad and indeterminate scope of the due process clause, as applied to the novel circumstances involved here, in no way discloses a plain and indisputable obligation that the Administration afford the hearings which the plaintiff has sought." (Br. at 34).

[3, 4] We believe that the Secretary's position is in error. Its chief deficiency is that in effect it confuses the issue of jurisdiction under the Mandamus Act with the process of resolving the merits of plaintiff's claim. We fully recognize that this case presents complex constitutional issues[10] which have not yet been definitively settled, and we agree that *Goldberg* v. *Kelly* is not plainly controlling. The complexity

[10] We also agree with the district court that the Mandamus Act encompasses constitutional obligations as well as statutory duties. See *Burnett* v. *Tolson*, 474 F. 2d 877 (4th Cir., 1973); *Mead* v. *Parker*, 464 F. 2d 1108 (9th Cir., 1972). In *Richardson*, *supra*, we held that mandamus was available to enforce a constitutional duty allegedly arising under the "Statement and Account" clause of the Constitution, Art. I, § 9, cl. 7, even though Congress had enacted a law expressly exempting the Central Intelligence Agency from the requirement to publish a statement and account of its receipts and expenditures. We also observed in Richardson that "mandamus should be construed liberally in cases charging a violation of a constitutional right." *Richardson*, *supra* 465 F. 2d at 851.

and novelty of the issues on the merits, however, do not necessarily deprive the federal courts of mandamus jurisdiction. A determination with respect to jurisdiction involves a threshold inquiry into whether the plaintiff has alleged a cause of action under the particular jurisdictional statute. Here, plaintiff alleges that the due process clause imposes an obligation on the Secretary to provide her with an oral hearing before adjusting her benefits. Thus, the duty alleged involves no element of discretion or room for judgment on the part of the Secretary,[11] and if we agree with plaintiff's contention on the merits, the result will be to place the Secretary under a binding, non-discretionary duty to provide a pre-recoupment oral hearing. Furthermore, the fact that the existence of the duty may become absolutely clear only after an interpretation of the due process clause and a consideration of the merits of the case does not deprive us of mandamus jurisdiction. See *Roberts* v. *United States*, 176 U.S. 221, 229–31, 20 S.Ct. 376, 44 L.Ed. 443 (1899); *Chaudoin* v. *Atkinson*, 494 F. 2d 1323, 1330 (3d Cir., 1974); *Carey* v. *Local Board No. 2, Hartford, Connecticut*, 297 F. Supp. 252, 255 (D. Conn.), *aff'd per curiam*, 412 F. 2d 71 (2d Cir.,

[11] This case is therefore distinguishable from *Jarrett* v. *Resor*, 426 F. 2d 213 (9th Cir. 1970), on which the Secretary relies. *Jarrett* held that mandamus does not lie to compel the Army to grant a soldier a discharge as a conscientious objector. That case thus involved an exercise of judgment as to whether that particular plaintiff had met the legal criteria for being a conscientious objector and would largely involve an evaluation of the sincerity of the claimant's beliefs. By contrast, the plaintiff here is not challenging an exercise of judgment, but is alleging a failure to comply with the mandates of the due process clause.

1969).[12] Acceptance of the Secretary's reasoning would lead to an oddly circular result—if mandamus jurisdiction were unavailable because, prior to ruling on the merits, the Secretary's duty is not clear, then a court would never have jurisdiction to determine *whether* his duty was clear in the first place.[13]

[5] Furthermore, we note that this is not a case where a plaintiff seeks to impose a wholly novel obligation on Government officials through the device of mandamus. While *Goldberg* v. *Kelly* may not be plainly controlling on the merits, it is a landmark precedent which imposes, under certain circumstances,

[12] See also *Schlagenhauf* v. *Holder*, 379 U.S. 104, 110, 85 S.Ct. 234, 13 L.Ed. 2d 152 (1969), where the Supreme Court indicated that mandamus was appropriate to settle novel and important problems; and *Garfield* v. *Goldsby*, 211 U.S. 249, 29 S.Ct. 62, 53 L.Ed. 168 (1908), where the Supreme Court held that mandamus was available to compel the Secretary of the Interior to restore plaintiff Indian to the rolls, because the Secretary, in the absence of statutory authority and in violation of due process of law, had stricken plaintiff's name from the rolls without providing notice and an opportunity to be heard.

[13] While the Secretary purports to disclaim advocating a "plain meaning" rule for purposes of determining mandamus jurisdiction (Brief at 34–35 n. 25), we believe that that is essentially what he does advocate, since he proceeds to contend that *Goldberg* v. *Kelly* is distinguishable, that the case law fails to establish an indisputable duty to provide pre-recoupment hearings, and that the result of an inquiry into the extent of the Secretary's obligations (apparently through examining legal precedents) "still leaves the issue in doubt." While we acknowledge that there is no binding precedent directly on point, we believe for the reasons already stated that that fact does not deprive us of mandamus jurisdiction. Jurisdiction depends on whether a plaintiff has alleged a cause of action, and if we rule in plaintiff's favor on the merits, the result of our inquiry will be to remove any doubt as to the Secretary's constitutional obligations in recoupment cases.

a constitutional obligation on administrators of social welfare programs to provide oral hearings, and thus it is at least arguably controlling in this case. Our task here is essentially to determine whether the same constitutional duty imposed by *Goldberg* in welfare termination cases is also applicable to social security cases involving recoupment of overpayments. Under these circumstances, we agree with the district court that the applicability of *Goldberg* is sufficiently apparent, in determining the threshold issue of mandamus jurisdiction, for us to say that plaintiff has alleged a clear duty on the part of the Secretary. We therefore believe that, since plaintiff here has relied on a closely analogous Supreme Court decision in alleging a clear constitutional duty owed her by the defendant, and since acceptance of her legal theory on the merits would establish such a clear duty, then jurisdiction to consider the merits exists under the Mandamus Act.

IV. The Class Action

[6] The Secretary raises two separate arguments challenging the propriety of the district court's order certifying the action as a class action. First, he contends that the district court erred in failing to provide notice to all the members of the class. Unlike the recent Supreme Court decision in *Eisen* v. *Carlisle & Jacquelin,* 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed. 2d 732 (1974), this action was not maintained under Rule 23(b)(3) of the Federal Rules of Civil Procedure, but rather under Rule 23(b)(2). Thus, the mandatory notice provision of Rule 23(c)(2) does not apply. The Secretary, however, contends that some form of notice to all class members is constitutionally required, relying on *Eisen* v. *Carlisle & Jacquelin,* 391 F. 2d 555 (2d Cir., 1968). Recently, however, this Circuit has declined to follow the Second Circuit view and has held that notice to the absent class members is not constitutionally required in an action maintained under Rule 23(b)(2). *Wetzel* v. *Liberty Mutual Insurance Co.,* 508 F. 2d 239, 254–57 (3d Cir., 1975). We adhere to that view.[14]

The Secretary's second contention is that the class order was overbroad.[15] The Secretary bases this contention on a distinction he draws between two subclasses of recoupment cases. The first he terms "reconsideration" cases, in which a claimant merely denies that he in fact received an overpayment or disputes the amount he was allegedly overpaid. The second he terms "waiver" cases, in which the claimant concedes that he received an overpayment but seeks to rely on the provisions of section 204(b) of the Act,[16] *i.e.*, he contends that he was not at fault and that the recoupment would frustrate the purposes of the Act or would be against equity and good conscience. The Secretary further asserts that the plaintiff was only seeking to "waive" recoupment and thus could not represent individuals seeking "reconsideration." He therefore con-

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[14] We also note that the Second Circuit recently indicated that it did not intend to require notice in class actions brought under Rule 23(b)(2). *Frost* v. *Weinberger,* 515 F. 2d 57 (2nd Cir., 1975).

[15] The initial class order, issued on April 30, 1974, defined the class as "consisting of all persons eligible for Social Security OASDI benefits within the counties encompassed by the Eastern District of Pennsylvania, whose benefits may be terminated, reduced or otherwise adjusted in order to recoup an over-payment." Subsequently, in its order of June 10, 1974, granting final injunctive relief, the district court further limited the class in a manner not relevant to this appeal.

[16] *See* note 1, *supra.*

tends that, to the extent that the class encompassed "reconsideration" cases as well as "waiver" cases, it was overbroad.

As we discuss in greater detail *infra,* we agree that "reconsideration" and "waiver" cases present somewhat different legal issues, and thus we conclude that the final judgment must be modified to take these differences into account. However, we believe that a distinction must be made between requiring entry of a new judgment after ruling on the merits, which would have the incidental effect of limiting the class, and directly modifying the scope of the class prior to a ruling on the merits, which the Secretary appears to ask us to do. While this may seem at first glance to be a distinction without a difference, we believe that there would be a significant difference in this case. If we accept the Secretary's contentions that the class order was overbroad to the extent that it included "reconsideration" cases and that we should limit the class to "waiver" cases (on the ground that plaintiff sought only "waiver" of recoupment), then we could not even consider the constitutionality of the Secretary's recoupment procedure in "reconsideration" cases. *Cf. Kauffman* v. *Dreyfus Fund, Inc.,* 434 F. 2d 727 (3d Cir., 1970), cert. denied, 401 U.S. 974, 91 S. Ct. 1190, 28 L. Ed. 2d 323 (1971). If, however, we accept the class as defined by the trial judge, then we must consider the constitutionality of recoupment in both "waiver" and "reconsideration" cases, drawing whatever distinction we think is appropriate in terms of the relief granted.

[7] We conclude, however, that under established legal principles, we must accept the district court's definition of the class, and that we must therefore consider the constitutionality of all types of recoupment cases. While the Secretary argues basically that there were two distinct subclasses in recoupment cases and that plaintiff was a member of only one of them, the district court defined the class to include recipients in essentially all cases where benefits were recouped without a prior oral hearing.[17] Since such an order concerned the size of the class and since the Secretary made no motion in the district court, based on Fed. R. Civ. P. 23(a), to limit the class to "waiver" plaintiffs, the order was within the discretion of the district court and thus its decision should be affirmed. *Wetzel, supra* 508 F. 2d at 253; *Brown* v. *United States,* 508 F. 2d 618, 627 (3d Cir., 1974); *Carey* v. *Greyhound Bus Co.,* 500 F. 2d 1372, 1380 (5th Cir., 1974).

For the foregoing reasons, we believe that the district court did not err in concluding that the class included all recoupment cases rather than merely "waiver" cases. While "waiver" and "reconsideration" cases require somewhat differing legal analysis, as we note *infra,* they are not so different that the district court committed reversible error in treating the class as a single large class encompassing all recoupment cases. Furthermore, as indicated above it does not appear that the Secretary, in his motion in opposition to plaintiff's motion for a class action in the district court, raised the contention that the class order, if granted, should be limited solely to "waiver" cases. Under these circumstances, we cannot conclude that the district court erred in defining the class as broadly as it did.[18]

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[17] See note 14, *supra.*

[18] Thus, we need not decide whether, on the facts of this case, plaintiff sought only "waiver" of recoupment.

V. The Merits [19]

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[8] The chief precedent upon which plaintiff relies is *Goldberg* v. *Kelly, supra.* In that case, the Supreme Court held that due process requires that welfare officials provide notice and an oral hearing prior to any termination of benefits. The Court relied heavily on the welfare recipients' "brutal need" for continued payments. A "crucial factor," in its view, was that "termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits." Adopting a balancing test, the Court concluded that "the interest of the eligible recipient in uninterrupted receipt of public assistance, coupled with the State's interest that his payments not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in fiscal and administra-

[19] In addition to holding that due process required an oral hearing prior to the recoupment of benefits, the district court concluded that *ex parte*, summary decisions on recoupment are contrary to the "purpose" of the Social Security Act. This conclusion as to the Act's "purpose" was dictum, however, since the district court stated that mandamus jurisdiction would require a showing that the Secretary was under a clear, non-discretionary duty, which in turn depended upon an analysis of the due process issue. 377 F.Supp. at 916–17. We agree that mandamus jurisdiction cannot rest on something as nebulous as an act's "purpose," at least where the act, as here, does not by its terms require a hearing. In any event, we question whether the mere fact that the "purpose" of the Act may be "compassionate" can be any basis for concluding that its purpose can be furthered only by requiring oral pre-recoupment hearings. But *cf. California Dept. of Human Resources Development* v. *Java*, 402 U.S. 121, 91 S.Ct. 1347, 28 L.Ed.2d 666 (1971).

tive burdens." *Goldberg, supra,* 397 U.S. at 266, 90 S.Ct. at 1019.

The Secretary, however, contends that *Goldberg* is distinguishable and that it must be read in the light of subsequent decisions which have further refined the requirements of due process. The Secretary's first argument is that, except in most unusual circumstances as evidenced by *Goldberg* v. *Kelly*, the Supreme Court has not required oral evidentiary hearings prior to a deprivation of a property interest where the preliminary pre-deprivation proceedings are sufficient to establish the "probable validity" of the administrative claim. Pointing to its procedures providing for an initial determination and a reconsideration, coupled with the right to submit written responses and documentary proof, the Secretary contends that the pre-recoupment procedure followed by the Social Security Administration is sufficient to establish the "probable validity" of a decision to recoup, and that a *post*-recoupment oral hearing therefore satisfies due process. We see several basic problems with this analysis, however.

First, the Secretary relies primarily on a line of cases which, while having some relevance on the issue, did not purport to overrule or modify *Goldberg* and are not controlling here. *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600, 94 S. Ct. 1895, 40 L. Ed. 2d 406 (1974); *Fuentes* v. *Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L. Ed. 2d 556 (1972); *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337, 89 S. Ct. 1820, 23 L. Ed. 2d 349 (1969). Of these three decisions, only *Mitchell* indicated that "probable validity" may be determined in the absence of a prior oral hearing; *Fuentes* and *Sniadach*, in fact, required prior oral hearings. Thus, *Mitchell*, rather than *Goldberg*, represents the excep-

tion to the rule. Also, those three cases, unlike *Goldberg*, involved creditors' *ex parte* seizure of property belonging to debtors,[20] and thus present somewhat different legal considerations than state termination or reduction of benefits under social welfare programs. At no point did the Court in *Mitchell* indicate that *ex parte* proceedings to determine "probable validity" were permissible outside of the creditor/debtor context. In *Goldberg*, the Supreme Court considered a state welfare procedure in which a claimant had a right, after being interviewed by his caseworker and prior to termination of benefits, to receive a written explanation of the reasons for termination and to submit written information in rebuttal. He also had a right to a full oral hearing *after* termination. 397 U.S.

[20] The Secretary also cites *Bell* v. *Burson*, 402 U.S. 535, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971), but that case is not on point, since the Court there, as in *Fuentes* and *Sniadach*, held that some kind of hearing was required before the revocation of a driver's license. While it said that the purpose of the hearing was only to determine the "reasonable possibility" of the driver's wrongful conduct, and while it left the scope of such a hearing undefined, it still required an *oral* hearing prior to revocation. See footnote 31 *infra*.

The Secretary also cites *Arnett* v. *Kennedy*, 416 U.S. 134, 94 S. Ct. 1633, 40 L. Ed. 2d 15 (1974), but that case contained five separate opinions, none of which represented a majority view. Only three Justices (Powell, Blackmun and White) indicated that an *ex parte* determination of "probable validity" might satisfy due process in the context of employee discharges. The plurality opinion held that there was no due process right to a hearing prior to discharge, because the "property interest" involved, unlike those in *Goldberg*, *Bell* and *Sniadach*, "was itself conditioned by the procedural limitations which had accompanied the grant of that interest." *Id.* at 155, 94 S. Ct. at 1645. Consequently, the plurality held that there was no claim of entitlement to the job. However, a majority of the Court rejected the plurality's view. *Id.* at 166–67, 94 S. Ct. 1633 (Powell, J., concurring), and 211, 94 S. Ct. 1633 (Marshall, J., dissenting).

at 258–60, 90 S. Ct. 1011. The Court, however, held that this procedure was insufficient and required an oral hearing prior to termination. Since the procedure invalidated in *Goldberg* would seem to be at least as effective in ensuring "probable validity" as the procedure used here,[21] and since the Court in *Mitchell* did not purport to modify *Goldberg*, we refuse to extend the reasoning of *Mitchell* outside the creditor/debtor context and to permit *ex parte* determination of "probable validity" in social welfare cases.

Furthermore, even if *Mitchell's* "probable validity" analysis were applicable to social welfare cases, the procedure here may not pass muster. The Supreme Court summarized this approach in *Mitchell, supra*, 416 U.S. at 611, 94 S. Ct. at 1902, by stating that *Sniadach* and *Fuentes*

> merely stand for the proposition that a hearing must be had before one is finally deprived of his property and do not deal at all with the need for a pretermination hearing where a full and *immediate* post-termination hearing is provided. (Emphasis added.)

The Court upheld the Louisiana sequestration statute challenged in *Mitchell* partly because it provided for an immediate hearing after the writ issued. *Id.* at 618, 94 S. Ct. 1895.[22] Thus, the constitutionality of a proce-

[21] Both procedures permit written submissions and documentary proof, but the procedure here, unlike the one invalidated in *Goldberg*, does not require a Government official to discuss the case with the beneficiary in person prior to a decision to recoup. See 397 U.S. at 258, 90 S. Ct. 1011.

[22] The Court in *Mitchell*, noted that the Florida statute invalidated in *Fuentes* provided the buyer with a right to a hearing only "eventually," and that under the Pennsylvania statute invalidated in the same case, a buyer may never get a hearing. *Mitchell*, *supra* at 615–16, 94 S. Ct. 1895.

dure establishing "probable validity" without a full oral hearing prior to the property deprivation may depend in part on whether there is an immediate right to an oral hearing afterward.[23] As we noted previously, however, there seems to be a delay of several months from the time recoupment has begun to the time a recipient is provided a hearing.

Finally, if the Secretary's pre-recoupment procedures are to be upheld on the ground that they are sufficient to determine "probable validity," they would have to be effective in minimizing the risk of an erroneous determination. See *Mitchell, supra* at 618, 94 S. Ct. 1895; *Arnett* v. *Kennedy,* 416 U.S. 134, 94 S. Ct. 1633 (1974), at 170, 94 S.Ct. 1633 (Powell, J., concurring) and 188, 94 S. Ct. 1633 (White, J., concurring in part and dissenting in part). However, the Secretary's own figures undercut his contention that the procedures at issue here are effective to minimize erroneous decisions to recoup.[24] In 1970, the only year from which figures have been made available to us, over

[23] Similarly, the recent Supreme Court decision in North *Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601, 95 S. Ct. 719, 42 L. Ed. 2d 751 (1975), distinguished *Mitchell* in part because the Georgia garnishment statute, unlike the Louisiana sequestration statute upheld in *Mitchell*, did not provide for an immediate hearing. *Id.* at 4194. See also *Fusari* v. *Steinberg*, 419 U.S. 379, 386, 95 S. Ct. 533, 42 L. Ed. 2d 521 (1975), where the Supreme Court indicated that the length of the period of deprivation of benefits and the rapidity of administrative review were important factors bearing on the constitutionality of termination procedures.

[24] We also note that pre-recoupment procedures lack some of the institutional safeguards that the Court in *Mitchell* indicated were important, such as the requirements that the party seeking the writ file an affidavit setting forth specific facts and that the pre-deprivation decision be made by a neutral magistrate.

one-third of all persons seeking a post-recoupment hearing (560 out of 1600) obtained reversals.[25]

[9] Therefore, because of a combination of factors—the fact that the Supreme Court has given no indication that *Mitchell's ex parte* "probable validity" approach is applicable outside the creditor/debtor context, and that such an approach appears to have been at least implicitly rejected in *Goldberg* v. *Kelly*; the substantial delay between the initiation of recoupment and an oral hearing; and the significant reversal rate following post-recoupment hearings—we conclude that the pre-recoupment procedures cannot be defended on the ground that they are sufficient to establish the "probable validity" of the determination in question.

The Secretary also seeks to distinguish *Goldberg* by arguing that the impact of a termination of welfare benefits is more severe than a recoupment of a social security overpayment, since welfare recipients, unlike social security beneficiaries, are by definition destitute and since a beneficiary, whose payments have merely been reduced, is still obtaining some assistance. *Goldberg*, as noted previously, rested in large part on welfare recipients' "brutal need" for continued payments, noting that "[t]he extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss.'" *Goldberg, supra*, 397 U.S. at 262–63, 90 S.Ct. at 1017, quoting *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U.S. 123, 168, 71 S. Ct. 624, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring). The Secretary also relies on *Torres* v. *New York State*

[25] The Secretary's figures, however, make no distinction between "reconsideration" and "waiver" cases.

Dept. of Labor, 321 F. Supp. 432 (S.D.N.Y.1971), *vacated and remanded,* 402 U.S. 968, 91 S. Ct. 1685, 29 L. Ed. 2d 133 (1971), *adhered to,* 333 F. Supp. 341 (S.D.N.Y.1971), *affirmed,* 405 U.S. 949, 92 S. Ct. 1185, 31 L. Ed. 2d 288 (1972), in which the Supreme Court affirmed without opinion a three-judge district court decision, which had held that a state may deny a claim for unemployment insurance without a prior oral hearing since the denial of unemployment compensation does not necessarily result in severe economic harm to the claimant.[26]

Since *Goldberg* and *Torres,* however, the Supreme Court has indicated, though not with complete consistency, that the requirements of due process do not depend on the severity of the impact resulting from the deprivation. In *Fuentes, supra* at 88–89, 92 S. Ct. at 1998, the Court rejected the contention that *Goldberg* carved out a rule of "necessity," and stated that that decision was "in the mainstream of past cases, having little or nothing to do with absolute 'necessities' of life but establishing that due process requires an opportunity for a hearing before a deprivation of property takes effect." The Court in *Fuentes* relied in part on *Bell* v. *Burson,* 402 U.S. 535, 91 S. Ct. 1586, 29

[26] Plaintiff seeks to discount the precedential effect of *Torres* by pointing to language in *Fusari, supra,* indicating that a summary affirmance affirms only the result and not the reasoning of the lower court. However, since we see no way in which *Torres* and *Goldberg* are distinguishable on the due process issue other than by comparing the severity of the impact, we believe that the Supreme Court's summary affirmance should be construed as an acceptance of this distinction, at least to the extent that *Torres* is given any precendential weight. Compare *Doe* v. *Hodgson,* 478 F. 2d 537, 539 (2d Cir. 1973), with *Edelman* v. *Jordan,* 415 U.S. 651, 670–71, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974), and *Dillenburg* v. *Kramer,* 469 F. 2d 1222, 1225 (9th Cir. 1972).

L. Ed. 2d 90 (1971), which had held that there must be an opportunity for a hearing on the issue of fault before "mere" suspension of a driver's license. The Court in *Fuentes* observed that drivers' licenses were not "necessities" like welfare or wages, but were nevertheless sufficiently important to be entitled to protection under due process. More recently, in *Mitchell, supra,* 416 U.S. at 610, 94 S. Ct. 1895, the Supreme Court seemed to retract somewhat by indicating that one of the factors to take into account, in deciding whether a prior hearing was required, was the impact of the deprivation.

In its most recent pronouncements, however, the Supreme Court has indicated that severity of impact is not a prerequisite. In *North Georgia Finishing, supra,* the Court reaffirmed much of the *Fuentes* analysis (419 U.S. at 605, 95 S. Ct. 719), and held that commercial establishments have the same due process rights as consumers (419 U.S. at 606, 95 S. Ct. 719). Furthermore, in *Goss* v. *Lopez,* 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975), the Supreme Court held that due process requires an oral hearing prior to disciplinary suspensions from school. In rejecting the school board's argument that a prior hearing was not required because students suspended for ten days did not suffer "grievous loss," the Court stated:

> "Appellee's argument is again refuted by our prior decisions; for in determining 'whether due process requirements apply in the first place, we must not look to the "weight" but to the *nature* of the interest at stake.' *Board of Regents* v. *Roth, supra,* [408 U.S.] at 570–71 [92 S. Ct. 2701, at 2705–2706, 33 L. Ed. 2d 548]. Appellees were excluded from school only temporarily, it is true, but the length and consequent severity of a deprivation, while another factor to weigh

> in determining the appropriate form of hearing, 'is not decisive of the basic right' to a hearing of some kind. *Fuentes* v. *Shevin*, 407 U.S. 67, 86 [92 S. Ct. 1983, 1997, 32 L. Ed. 2d 556] (1972). The Court's view has been that as long as a property deprivation is not *de minimis*, its gravity is irrelevant to the question whether account must be taken of the Due Process Clause. *Goss, supra* at 575, 95 S. Ct. at 737."

[10] We therefore believe that we are constrained by Supreme Court's most recent pronouncements not to base our decision on our perception of the severity of the impact of recoupment on social security recipients, provided we determine that the impact is not *de minimis*. The impact in this case is surely more than *de minimis*, since we believe that Congress, in enacting a program providing disabled widow's benefits, recognized that recipients like Mrs. Mattern were in need of assistance. We also note that the facts of this case indicate that Mrs. Mattern was both disabled and without any other source of income.[27]

We are aware of the recent Second Circuit decision, *Frost* v. *Weinberger*, 515 F. 2d 57 (2d Cir. 1975), but decline to follow it. First, we note that that decision is distinguishable in several respects. At issue in *Frost* was whether a hearing was required before a reduction in benefits to surviving legitimate children. Such a reduction was required because of the competing claims of illegitimate children of the wage earner

[27] The "Refund Questionnaire" which plaintiff filled out stated that she had no other source of income besides her monthly disability check (54a). We observe, however, the Refund Questionnaire was dated August 7, 1972, and there is the possibility that plaintiff could have applied for, and received, welfare payments since that date.

and because of the statutory ceiling on total payments allowable. 42 U.S.C. § 403(a) (1970). Thus, as the court in *Frost* noted, the controversy was not so much one between the Government and beneficiaries as between two groups of beneficiaries, with the Social Security Administration having "no financial stake" and being "totally disinterested as between the two sets of claimants." Unlike *Goldberg*, therefore, where the only interest conflicting with that of the plaintiffs was the Governmental interest in protecting its resources, in *Frost* there were "important private interests as well," *i.e.*, the interest of the illegitimate children to promptly receive payments to which they were entitled. Such a competing private interest, of course, is not present here. Furthermore, the court in *Frost* noted that the type of hearing that would be required would place unusual burdens on the Social Security Administration because of the possibility that legitimate and illegitimate children, all of whom would have to be present or represented at a hearing might be living in different areas. The court further noted that "a paternity hearing may demand an inquiry into the habits of a father long before married or long after his departure from the matrimonial household." These factors convinced the court in *Frost* that a paternity hearing would be less prompt and more protracted than the brief hearings likely to arise in welfare-termination cases, and thus the court concluded that those factors cut "in favor of allowing the SSA to act preliminarily on the basis of something less than a full-scale hearing." Those factors are not present here, and we believe that the hearings are likely to be as simple as those in welfare termination cases.

We also note that the court in *Frost* relied heavily on the analysis that a prior oral hearing was required only in cases where the deprivation was severe.[28] As we stated earlier, however, we do not read the post-*Goldberg* decisions as making due process requirements turn on the severity of the impact. The opinion in *Frost* nowhere mentioned the Supreme Court decisions in *Bell* v. *Burson, Fuentes* v. *Shevin, North Georgia Finishing* or *Goss* v. *Lopez,* which we read as requiring prior hearings wherever the impact is more than *de minimis.* The court in *Frost* relied heavily on *Arnett* v. *Kennedy, supra,* but as we observed previously (*see* note 19 *supra*), that decision presented five separate opinions, each offering different rationales and none representing a majority view. Only three of the Justices (Powell, Blackmun and White) indicated that the right to a hearing would turn, at least in

[28] We note this language in the *Frost* case:

"The Court's decisions can be fairly summarized as holding that the required degree of procedural safeguards varies directly with the importance of the private interest affected and the need for and usefulness of the particular safeguard in the given circumstances and inversely with the burden and any other adverse consequences of affording it.

"... An element crucial to *Goldberg* was that the benefits at issue were awarded on the basis of need and represented the last source of income available to the families. The benefits here at issue are not based upon need; .... [pp. 66–67 of 515 F. 2d]

"... [I]n cases where a reduction in such benefits would place a family below the subsistence level, other forms of government assistance would become available, however, unattractive resort to them may be. The weights in favor of departing from the ordinary principle that something less than a full-scale evidentiary hearing suffices *before* administrative action, when a full hearing is provided promptly thereafter, are thus substantially less than in *Goldberg* [p. 67 of 515 F.2d]"

part,[29] on the severity of the impact. 416 U.S. at 169, 94 S. Ct. 1633 (Powell, J., concurring) and 201–02, 94 S. Ct. 1633 (White, J., concurring in part and dissenting in part). Given the fact that a majority of the Court in *Arnett* did not employ the rational adopted in *Frost,* we continue to adhere to our reading of *Bell,*

[29] We note that in *Arnett*, the separate opinions of Justices Powell (with whom Justice Blackmun joined) and White did not rely solely on the fact that they perceived the impact on a discharged Government worker to be less severe than that on a welfare recipient whose benefits have been terminated. Justice Powell also relied on the potential disruption to Government efficiency and mor le if the Government were required to retain a disruptive or otherwise unsatisfactory employee pending a hearing, 416 U.S. at 168, 94 S.Ct. 1633, a factor which, of course, is not present in this case. Justice White likewise placed several factors in the balance, 416 U.S. at 190, 94 S.Ct. 1633. One of them was the risk that the initial deprivation may be wrongful. In fact, this was essentially the reason he dissented in part. (The fatal defect, in his view, was the lack of an impartial hearing examiner). As we noted earlier, the significant reversal rate in recoupment cases after a hearing is empirical evidence that there is indeed a serious risk that the initial deprivation may be wrongful. Also, if the Governmust continue to pay a worker pending a hearing, those payments cannot be recovered even if the Government should prevail. 416 U.S. at 193, 94 S.Ct. 1633. Here, however, the Social Security Administration, if it prevails at the hearing, should be able to recoup the full amount of the overpayment (provided the claimant does not die before the completion of recoupment).

Finally, we believe that if *Arnett* is construed to have turned on the fact that a discharged Government employee did not suffer a sufficiently serious deprivation, that decision must necessarily have overruled *Perry* v. *Sindermann*, 408 U.S. 593, 603, 92 S.Ct. 2694, 33 L.Ed. 2d 570 (1972), a result which none of the Justices in the *Arnett* majority purported to accomplish. A college professor who has a de facto claim to tenure and who is entitled to a hearing under *Perry* is no more reduced to a state of "brutal need" by the nonrenewal of his contract than is a discharged OEO civil servant.

Fuentes, North Georgia Finishing and *Goss* v. *Lopez*. We also note that two other Circuits have concluded that due process requires a hearing in cases involving termination of social security payments. *Eldridge* v. *Weinberger*, 493 F. 2d 1230 (4th Cir. 1974), *aff'g* 361 F. Supp. 520 (W.D. Va. 1973), *cert. granted*, 419 U.S. 1104, 95 S. Ct. 773, 42 L. Ed. 2d 800 (1975); *Williams* v. *Weinberger*, 494 F. 2d 1230 (5th Cir. 1974), *aff'g* 360 F. Supp. 1349 (N.D. Ga. 1973).

B

Another contention raised by the Secretary is more convincing. This argument is that recoupment cases present issues which are well adapted to resolution by written submissions and documentary proof. Consequently, he argues, an oral hearing would be superfluous and should not be constitutionally required. As we will explain in greater detail below, the applicability of this argument to recoupment cases necessitates a discriminating analysis of the different types of cases and of the different types of factual disputes likely to arise. However, we do accept the Secretary's basic premise that due process should not require a pre-recoupment oral hearing where factual disputes are as well suited to resolution by documentary proof and written submissions as by oral hearings.

Implicit in *Goldberg* v. *Kelly* is the recognition of the fact that issues likely to arise in welfare termination cases can only be resolved through an oral hearing. One of the plaintiffs was a woman whose benefits had been terminated because she allegedly failed to cooperate with welfare officials in suing her estranged husband. Another was a man whose benefits were terminated because he refused to accept drug counseling and rehabilitation, though he claimed that he did not

in fact use drugs. *Goldberg, supra*, 397 U.S. at 256 n. 2, 90 S. Ct. 1011. It is obvious that resolution of those factual disputes could only be made at an oral hearing, where the trier of fact could evaluate the credibility of the claimant. As the Court noted, "where credibility and veracity are at issue, as they must be in many termination proceedings, written submissions are a wholly unsatisfactory basis for decision." *Id.* at 269, 90 S. Ct. at 1021.

Similarly, in *Goss* v. *Lopez, supra*, the question of whether a student had engaged in disruptive conduct justifying suspension could not possibly be determined without an oral hearing. See also *Bell* v. *Burson, supra*, which required an oral hearing to determine fault before revocation of a driver's license. By contrast, the Supreme Court in *Mitchell* held that no prior opportunity whatsoever need be given the debtor to oppose repossession of his property, in part because the issue "turns on the existence of the debt, the lien, and the delinquency," which "are ordinarily uncomplicated matters that lend themselves to documentary proof." *Id.* 416 U.S. at 609, 94 S. Ct. at 1901. Thus, "[t]he nature of the issues at stake minimize the risk" of an erroneous *ex parte* determination. *Id.* at 609–10, 94 S. Ct. at 1901. See also *Burr* v. *New Rochelle Municipal Housing Authority*, 479 F. 2d 1165, 1169 (2d Cir., 1973), where the court stated that an oral hearing was not required prior to deciding whether to increase the rents of public housing tenants, since "the opportunity to present oral evidence is not particularly valuable where technical financial data is at issue."

[11] Application of the above principle to recoupment cases is more complex. As noted previously, the Secretary draws a distinction between "reconsideration" and "waiver" cases, arguing that they present

somewhat different legal issues. We agree with the Secretary that "reconsideration" cases are generally well suited to resolution by documentary proof, and that claimants in most cases of this type are not constitutionally entitled to a prior oral hearing.[30] Most of these disputes involve matters of a purely arithmetical nature—whether the computation of an earnings statement is correct; whether a computer's calculation of the amount of benefits received is accurate; whether two benefit checks have been received rather than one. In such circumstances, an examination of social security records and cancelled checks would seem to be sufficient, and it is hard to see how an oral hearing would be of much benefit to the claimant. Consequently, the Secretary's pre-recoupment procedures permitting written evidence and providing for an examination of written documents, when coupled with a right to a *post*-recoupment oral hearing, satisfy due process.

We add one *caveat,* however. Because we cannot envision all the situations in which "reconsideration" cases are likely to arise, we acknowledge the possibility that there may be cases where the opportunity to appear in person might be important in making an

[30] We decline to establish a flat rule that *all* "reconsideration" cases may be decided prior to recoupment without an oral hearing, since we do not have sufficient basis for knowing all the types of cases which the Secretary may classify as being of the "reconsideration" type. The crucial distinction is not whether the cases are labeled "reconsideration" or "waiver," but whether they lend themselves to resolution by documentary proof. Thus, while we shall use those terms as suggested by the Secretary for purposes of convenience, we do not mean to imply that the constitutionality of recoupment in a particular case is dependent upon the label used nor that we necessarily accept the Secretary's categorizations *in toto.*

accurate determination. Thus, while many "reconsideration" cases can be decided without a prior oral hearing, we believe that, as a matter of due process, the Secretary should establish procedures which would provide for an oral hearing where a case does not hinge on documentary evidence and where a claimant raises issues which necessitate an evaluation of his credibility. We are mindful of the concern expressed in *Goldberg* that many claimants lack the education or ability to frame written submissions in a persuasive light, and thus if a claimant in a "reconsideration" case *raises* such an issue, he should be entitled to a hearing.

If, however, a claimant merely denies receiving duplicate checks or claims that his earnings were of a certain amount, cancelled checks bearing his endorsement or earnings records maintained by the social security office would seem to constitute hard proof incapable of oral rebuttal. In this case, for example, if plaintiff had merely denied receiving the $1,063.80 check or had claimed that the check did not represent an overpayment, she would not have been constitutionally entitled to a hearing prior to recoupment. A cancelled check bearing her endorsement would be persuasive proof that she had received and cashed it, and the date of issue, coupled with the statutory six-month waiting period, would be persuasive proof that the check represented an overpayment. Furthermore, the plaintiff in this case, though given the opportunity to do so, came forth with no written evidence to support a contention that she had not in fact been paid $1,063.80 or that that check did not represent an overpayment. Consequently, if she had made solely those contentions, it is hard to see how a pre-recoupment oral hearing would be helpful. In all cases, however,

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a claimant should be informed, prior to initiation of recoupment, of the basis on which an adverse determination is made and should be offered the opportunity to explain or rebut any written evidence against her.

[12] With respect to "waiver" cases, the Secretary admits that resolution of factual disputes is more complex than in "reconsideration" cases, but offers essentially two reasons why pre-recoupment oral hearings in such cases should not be constitutionally required. First, relying on *Board of Regents* v. *Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972), and *Perry* v. *Sindermann*, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972), he argues that a recipient has no "claim of entitlement" to an overpayment and thus the due process clause "does not require the Secretary—in deciding to make a gift of funds improperly received by the beneficiary—to also stay his hand pending a hearing" on the waiver request (Br. at 24). We reject this analysis. Section 204(b) of the Act [31] gives a recipient of an overpayment a statutory right not to have his payments reduced under certain enumerated circumstances (if he is without fault, etc.), and in "waiving" recoupment the Secretary is not merely making a "gift," but is complying with the statute.[32] Thus, the fact that plaintiff may not have been entitled to receive the overpayment does not mean that she has no claim of entitlement to retain it (or at least to receive a full amount of her future monthly payments).

[13] The Secretary also contends that "waiver" cases, like "reconsideration" cases, lend themselves to

[31] *See* note 1 *supra*.

[32] The statute does not make "waiver" discretionary, but rather uses mandatory language: "*there shall be no*" recoupment under the conditions specified.

resolution by documentary proof. We disagree. One of the factors to be considered in a "waiver" case is whether the claimant is "without fault," and the Supreme Court has clearly indicated that determinations as to fault must be made at an oral hearing.[33] The facts of this case graphically illustrate the need for an oral hearing. In determining that plaintiff was not without fault, the Secretary relied on basically two factors—its records indicating that plaintiff had been informed of the overpayment by telephone, and its letter of January 28, 1972. Plaintiff denies that she received such a phone call, and we do not see how resolution of this factual dispute could possibly be made without allowing her to tell her story in person and enabling a trier of fact to evaluate her credibility. Similarly, a finding of fault could not rest on the ambiguous January 28 letter, at least without giving plaintiff an opportunity to explain in person what she thought it meant.[34] Another requirement that a claimant in a waiver case must meet is that recoupment would

[33] Cf. *Mitchell*, *supra*, at 416 U.S. 617, 94 S. Ct. at 1905, where the Supreme Court in discussing and distinguishing *Fuentes*, said:

"As in *Bell* v. *Burson*, where a driver's license was suspended without a prior hearing, when the suspension was premised on a fault standard, . . . in *Fuentes* this fault standard for replevin was thought illsuited for preliminary *ex parte* determination."

[34] That letter told her that a special check in the amount of $1063.80 was being mailed to her, and proceeded to say:

"We have taken steps to avoid duplication of payment. However, should you receive more than one check because of these dual actions, please return one of them to the social security district office immediately."

(51a). We believe it is perfectly reasonable for plaintiff to have believed that this letter was referring to the possibility that she might receive two $1063.80 checks. Since she only received one such check, we do not see how a finding of fault can be based on this letter.

either frustrate the purposes of the Act or be against equity and good conscience. As defined by the Secretary's regulations, these terms refer to such matters as difficulty in meeting necessary living expenses or a change of position by the recipient.[35] We do not see how a resolution of such questions can reliably be determined in the absence of oral testimony.

While we believe that claimants in "waiver" cases have a constitutional right to a pre-recoupment oral hearing, that right may not attach in all cases. Where a claimant in a "waiver" case raises no disputed issue of fact, or where, accepting his version of the facts as true, we could say as a matter of law that he was not entitled to retain the overpayment, then again it is hard to see how a pre-recoupment hearing would be of benefit.[36] Thus, the constitutional requirement of a hearing may be limited to some extent by principles analogous to summary judgment in civil litigation. See *Mills* v. *Richardson*, 464 F. 2d 995, 1001 (2d Cir., 1972). For example, if plaintiff in this case had admitted receiving a telephone call telling her that the impending $1,063.80 check was in error and that she should return it, and if she merely alleged hardship, then as a matter of law, she would not be without fault and the recoupment could proceed in advance of an oral hearing. The reason for this is that, under section 204(b) of the Act, a claimant seeking to waive recoupment must establish two things: that he is without fault *and* that the recoupment would defeat the purpose of the Act or be against equity and good conscience. Thus, if plaintiff's written response had conceded one of these two elements, she would have no legal right to retain the overpayment.[37]

[35] *See* notes 3 and 4 *supra*.

[36] The Supreme Court explicitly left open this issue in *Goldberg*, *supra* 397 U.S. at 268 n.15, 90 S.Ct. 1011.

C

[14] In sum, we conclude that the recoupment procedure established by the Secretary is constitutionally deficient in that it does not provide for pre-recoupment oral hearings in the situations we have indicated are necessary. We do not believe that due process requires pre-recoupment oral hearings in all cases, but the Secretary's existing procedure makes no distinction between the various types of cases and issues that are likely to arise. To the extent that a hearing is required, we agree with the district court that the full panoply of procedural safeguards need not be provided and that the pre-recoupment hearing need not take the form of a judicial or quasijudicial trial. In *Richardson* v. *Perales*, 402 U.S. 389, 399–401, 91 S. Ct. 1420, 1426, 28 L. Ed. 2d. 842 (1971), the Court has explained the informal nature of social security hearings in this language:

> The Social Security Act has been with us since 1935. Act of August 14, 1935, 49 Stat. 620. It affects nearly all of us. The system's administrative structure and procedures, with essential determinations numbering into the millions, are of a size and extent difficult to comprehend. But, as the Government's brief here accurately pronounces, "Such a system must be fair—and it must work."
>
> "Congress has provided that the Secretary
>
> "'shall have full power and authority to

[37] Furthermore, like the district court, we conclude that a hearing is not required where the claimant has made a knowing, intelligent and voluntary waiver of the right.

make rules and regulations and to establish procedures . . . necessary or appropriate to carry out such provisions, and shall adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits hereunder.' § 205(a), 42 U.S.C. § 405(a)."

"From this it is apparent that (a) the Congress granted the Secretary the power by regulation to establish hearing procedures; (b) strict rules of evidence, applicable in the courtroom, are not to operate at social security hearings so as to bar the admission of evidence otherwise pertinent; and (c) the conduct of the hearing rests generally in the examiner's discretion. There emerges an emphasis upon the informal rather than the formal. This, we think, is as it should be, for this administrative procedure, and these hearings, should be understandable to the layman claimant, should not necessarily be stiff and comfortable only for the trained attorney, and should be liberal and not strict in tone and operation. This is the obvious intent of Congress so long as the procedures are fundamentally fair."

[15, 16] We therefore believe that due process requires only an informal, oral hearing which provides the following safeguards:[38]

1) an impartial decision maker separated from those making the previous administrative determinations in the case;[39]

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[38] We note with approval the type of procedure followed in *Brower* v. *Wohlgemuth*, 371 F.Supp. 863 (E.D. Pa. 1974).

[39] In *Twigger* v. *Schultz*, 484 F. 2d 856, 859 (3d Cir. 1973), Judge Gibbons pointed out:

"A more reasonable construction of the entire Act, which we

2) timely and adequate notice to the recipient of the reasons for recoupment;

3) an effective opportunity for the recipient to confront and cross-examine adverse witnesses;

4) an effective opportunity for the recipient to present his own arguments and evidence orally;

5) an opportunity to retain counsel or have the informal assistance of a friend, if the recipient desires;

6) a report written by the decision maker which informally states the reasons and the evidence relied on in reaching his decision;[40]

7) an opportunity for all parties to receive and challenge the decision maker's report before it becomes final.[41]

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adopt, is that there may be presiding officers other than those listed in § 7(a), but that the procedural safeguards of the Act, and specifically the separation of functions safeguard of § 5(c), apply to such presiding officers to the same extent as to those presiding officers listed in § 7(a)."

See also *Withrow* v. *Larkin*, —— U.S. ——, 95 S. Ct. 1456, 1464–1468, 43 L. Ed. 2d 712 (1975).

Due process does not require that the decision maker be an administrative law judge appointed under 5 U.S.C. § 3105 for "proceedings required to be conducted in accordance with" 5 U.S.C. §§ 556 and 557. Of course, statutory criteria exceeding due process requirements are nevertheless controlling as to the credentials of the presiding administrator.

[40] The presiding administrator's decision must rest solely on the evidence adduced at the hearing, in conformance with the hearing rules for receiving evidence. See *Richardson* v. *Perales*, *supra*, 402 U.S. at 400, 91 S. Ct. 1420; *Goldberg* v. *Kelly*, *supra*, 397 U.S. at 271, 90 S. Ct. 1011. The report "need not amount to a full opinion or even formal findings of fact and conclusions of law." *Goldberg* v. *Kelly* at 271, 90 S. Ct. at 1022.

[41] Such report could be submitted in draft form to all concerned for comment before final adoption.

See *Goldberg* v. *Kelly, supra,* 397 U.S. at 267–71, 90 S.Ct. 1011.

Although we are in partial agreement with the district court decision, we believe that the judgment of the district court should be vacated and remanded so that the district court can enter a new order defining the class in light of our ruling on the merits and in light of any further developments which have occurred since the final class determination on June 10, 1974.

Accordingly, the judgment of the district court will be vacated and the case remanded for entry of an appropriate judgment in accordance with this opinion.

APPENDIX B

United States Court of Appeals for the Third Circuit

No. 74–1776

ARLENE M. MATTERN

v.

CASPAR WEINBERGER, SECRETARY OF HEALTH, EDUCATION AND WELFARE, APPELLANT

(D.C. Civil Action No. 72–2522)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: Van Dusen, Gibbons and Hunter, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered June 12, 1974, be, and the same is hereby vacated, and the cause is remanded to the said District Court for entry of an appropriate judgment in accordance with the opinion of this Court.

Attest:

THOMAS F. QUINN, *Clerk.*

June 3, 1975.

APPENDIX C

In The United States District Court For The Eastern District of Pennsylvania

(Civil Action No. 72–2522; April 30, 1974)

ARLENE M. MATTERN

v.

CASPAR WEINBERGER, UNITED STATES SECRETARY OF HEALTH, EDUCATION, AND WELFARE

Opinion and Order

TROUTMAN, J.

This action challenges the procedure utilized by the Secretary of Health, Education, and Welfare [the Secretary], pursuant to Section 204 of the Social Security Act [the Act], to adjust or reduce social security benefits in order to recoup an alleged overpayment. Specifically, plaintiff, on behalf of herself and others similarly situated, seeks injunctive and declaratory relief, requiring the Secretary to conduct an evidentiary hearing prior to adjusting or reducing social security benefits to which plaintiff is entitled under Title II of the Act. 42 U.S.C. § 401 *et seq.* Plaintiff challenges the failure to provide an oral hearing prior to the recoupment of an alleged overpayment on the grounds that it is contrary to the purpose of the Act and violative of the Fourteenth Amendment to the Constitution. Presently before the Court are (1) defendant's motion to dismiss the

complaint for lack of jurisdiction, (2) plaintiff's motion for a class action determination, (3) plaintiff's motion to convene a three-judge court and (4) cross-motions for summary judgment.

The relevant facts are not in dispute and are as follows: Plaintiff, at the time this action was filed, was fifty-three years old and is presently disabled. In 1971, she filed an application for disabled widow's benefits pursuant to 42 U.S.C. §402(e)(1)(B)(ii) on the social security earnings record of her deceased husband. Her application was initially denied, but, upon reconsideration, she was found entitled to benefits effective December 1971.[1] Thereafter, plaintiff informed the social security office that she was in financial distress. Upon investigation, the office forwarded a request for a critical case payment to the Philadelphia payment center on the basis of plaintiff's alleged condition of hardship. The payment center failed to consider the statutory waiting period and erroneously certified payment of monthly benefits retroactive to May 1971 rather than December 1971. A check in the amount of $1063.80 was issued to plaintiff. Prior to the receipt of this check, plaintiff received another check in the amount of $119.30, representing her monthly entitlement. According to defendant, plaintiff was notified that the special check for $1063.80 was in error and should be returned.

Upon plaintiff's failure to return the check, she was notified of the alleged over-payment and the Secre-

[1] It was determined that plaintiff established a period of disability beginning on May 18, 1971. She was not entitled to benefits as of that date, because the Act, at that time, provided for a six-month waiting period between the onset date and entitlement to benefits. The Act, as amended in 1972, provides for a five-month waiting period. 42 U.S.C. § 423(c)(2).

tary's intent to adjust or reduce the amount of her monthly check in order to recoup the overpayment. Plaintiff, thereafter requested waiver of the recovery action and completed a "without fault" questionnaire. In her response, plaintiff admitted receiving the check for $1063.80, which she cashed to pay her bills, but denied the receipt of any notice that the check was not correct until she received the letter, indicating the Secretary's intent to recoup the over-payment. By letter dated October 20, 1972, plaintiff was advised that recovery of the overpayment could not be waived because she was not without fault and she was further advised of her right to request reconsideration of this determination. On November 20, 1972, plaintiff filed a request for reconsideration, and as a result of this request, the adjustment action was not implemented pursuant to Section 5503.5 of the Claims Manual. On December 29, 1972, plantiff commenced this civil action. Subsequently, the reconsideration decision upheld the initial determination on the ground that plaintiff was not without fault and, therefore, liable for recovery of the overpayment. In order to alleviate undue hardship, recovery by partial adjustment of $30 per month was recommended, commencing with her January 1973 benefit. As a result of this notice, the parties entered into a stipulation continuing plaintiff's full benefits until the disposition of this action.

Section 204 of the Act, 42 U.S.C. § 404, authorizes the Secretary, under regulations prescribed by him, to recover incorrect overpayments or to adjust benefits to provide for such recovery. Section 204 provides in pertinent part:

> (a) Whenever the Secretary finds that more or less than the correct amount of payment has been made to any person under this sub-

chapter, proper adjustment or recovery shall be made, under regulations prescribed by the Secretary, as follows:

(1) With respect to payment to a person of more than the correct amount, the Secretary shall decrease any payment under this subchapter to which such overpaid person is entitled, or shall require such overpaid person or his estate to refund the amount in excess of the correct amount, or shall decrease any payment under this subchapter payable to his estate or to any other person on the basis of the wages and self-employment income which were the basis of the payments to such overpaid person, or shall apply any combination of the foregoing. . . ."

(b) In any case in which more than the correct amount of payment has been made, there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.

Under subsection (b) of Section 204, no adjustment or recovery shall be made where such person is without fault [2] and such adjustment or recovery would

[2] "Fault" is defined in 20 CFR § 404.507 which provides:

"'Fault' as used in 'without fault' (see §§ 404.506 and 405.355) applies only to the individual. Although the Administration may have been at fault in making the overpayment, that fact does not relieve the overpaid individual or any other individual from whom the Administration seeks to recover the overpayment from liability for repayment if such individual is not without fault. In determining whether an individual is at fault, the Administration will consider all pertinent circumstances, including his age, intelligence, education, and physical and mental condition. What constitutes fault (except for 'deduction overpayments'—see § 404.510) on the part of overpaid individual or on the part of any other individual from whom the Administration seeks to recover the overpayment depends upon whether the facts show that the incorrect payment to the individual or to a provider of services or other person, or an incorrect payment made under section 1814(e) of the Act [42 U.S.C.A. § 1395f(e)], resulted from:

"(a) An incorrect statement made by the individual which he knew or should have known to be incorrect; or

"(b) Failure to furnish information which he knew or should have known to be material; or

"(c) With respect to the overpaid individual only, acceptance of a payment which he either knew or could have been expected to know was incorect."

defeat the purpose of Title II of the Act [3] or would be against equity and good conscience.[4]

[3] The phrase "defeat the purpose" of Title II is defined in 20 CFR § 404.508, which provides:

"(a) General. 'Defeat the purpose of title II [42 U.S.C.A. § 401 et seq.],' for purposes of this subpart, means defeat the purpose of benefits under this title, i.e., to deprive a person of income required for ordinary and necessary living expenses. This depends upon whether the person has an income or financial resources sufficient for more than ordinary and necessary needs, or is dependent upon all of his current benefits for such needs. An individual's ordinary and necessary expenses include:

"(1) Fixed living expenses, such as food and clothing, rent, mortgage payments, utilities, maintenance, insurance (e.g., life, accident, and health insurance including premiums for supplementary medical insurance benefits under title XVIII [42 U.S.C.A. § 1395 et seq.]), taxes, installment payments, etc.;

"(2) Medical, hospitalization, and other similar expenses;

"(3) Expenses for the support of others for whom the individual is legally responsible; and

"(4) Other miscellaneous expenses which may reasonably be considered as part of the individual's standard of living.

"(b) When adjustment or recovery will defeat the purpose of title II [42 U.S.C.A. § 401 et seq.]. Adjustment or recovery will defeat the purpose of title II [42 U.S.C.A. § 401 et seq.] in (but is not limited to) situations where the person from whom recovery is sought needs substantially all of his current income (including

See also 20 CFR § 404.506. 20 CFR § 404.901 *et seq.* of the Social Security Administration regulation sets forth a four-step administrative process by which a claimant may obtain review of a decision to adjust benefits in order to recoup an overpayment. Following an initial determination that an over-payment has been made and that there is no basis for waiver of recovery, the claimant may obtain reconsideration pursuant to 20 CFR 404.914. Subsequent to a reconsidered determination, an individual may request a hearing *de novo* before an administrative law judge, 20 CFR 404.917, and review by the Appeals Council of the Social Security Administration. 20 CFR 404.945. Thereafter, a claimant may seek judicial review in the district courts pursuant to § 205(g) of the Act. 42 U.S.C. § 405(g). During the period that a claimant is pursuing his administrative remedies, there is no provision in the Act or in the regulations, requiring that a hearing must be conducted prior to implementation of any adjustment or recovery. Section 5503.5 of the Claims Manual provides that where reconsideration of an initial determination is requested, "withholding to recoup the overpayment will be further deferred and

social security monthly benefits) to meet current ordinary and necessary living expenses."

[4] "Against equity and good conscience" is defined in 20 CFR § 404.509, which provides:

"'Against equity and good conscience' means that adjustment or recovery of an incorrect payment (under title II or title XVIII [42 U.S.C.A. § 401 et seq. or § 1395 et seq.]) will be considered inequitable if an individual, because of a notice that such payment would be made or by reason of the incorrect payment, relinquished a valuable right (examples (1), (2) and (5) or changed his position for the worse (examples (3) and (4)). In reaching such a determination, the individual's financial circumstances are irrelevant."

payment will be continued" until a decision upon reconsideration is made. Thus, under the regulations and provisions of the Claims Manual, adjustment of benefits in order to recoup an overpayment may be implemented following a decision upon reconsideration and there is no provision for a hearing *de novo* before an administrative law judge prior to the implementation of the adjustment.

I. Jurisdiction

In plaintiff's amended complaint, jurisdiction has been asserted under 28 U.S.C. § 1331, 28 U.S.C. § 1343(4), 28 U.S.C. § 1346 and 28 U.S.C. § 1361. In his motion to dismiss for lack of jurisdiction, defendant argues that none of the above provisions confer jurisdiction on this court and that plaintiff's action is barred by Sections 205(g) and 205(h) of the Act. 42 U.S.C. § 405(g)(h).[5]

[5] Section 205(g) of the Act provides:

"(g) Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding

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Section 205(g) provides that in order to obtain judicial review of a decision of the Secretary, it must be a final decision made after a hearing to which the claimant was a party, thereby requiring exhaustion of

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the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearings before the Secretary, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. The Court shall, on motion of the Secretary made before he files his answer, remand the case to the Secretary for further action by the Secretary, and may, at any time, on good cause shown, order additional evidence to be taken before the Secretary, and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or its decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office."

Section 205(h) of the Act, 42 U.S.C. § 405(h) provides:

"(h) The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 41 of Title 28 to recover on any claim arising under this subchapter."

administrative remedies. Section 205(h) specifically provides that no action against the Secretary shall be brought under Section 41 [now 28 U.S.C. § 1331] to recover on any claim arising under Title II of the Act. Defendant argues that Section 205(g) provides the exclusive means by which a claimant can obtain judicial review of a decision of the Secretary. Since plaintiff did not seek a *de novo* hearing before an administrative law judge following the denial of her request for reconsideration, it is argued that plaintiff's action is barred for failure to exhaust her administrative remedies. In addition, defendant argues that this action is barred by the specific language in Section 205 (h). We conclude that neither the doctrine of exhaustion of remedies nor the specific provision of Section 205(h) bar plaintiff's action under the facts of this case.

First, exhaustion is inapplicable because plaintiff claims that the statute and regulations promulgated thereunder are constitutionally insufficient in that they fail to provide a hearing prior to recoupment of an over-payment. Where a plaintiff attacks the constitutionality of the statute under which an administrative agency acts, the attack does not turn upon a factual determination requiring administrative expertise and the doctrine of exhaustion of administrative remedies, therefore, does not apply. See *Gainville* v. *Richardson*, [319] F.Supp. 16, 18 (D. Mass. 1970), and cases cited therein.

Secondly, the prohibition of Section 205(h), barring any action against the Secretary under Section 1331 of Title 28, is inapplicable in that plaintiff is not seeking to "recover on any claim" arising under Title II of the Act. The merits of plaintiff's claim are not before the Court and we are not asked to

review any decision of the Secretary. Plaintiff's sole claim is that she is entitled to a hearing prior to a determination to reduce or adjust her benefits, and plaintiff seeks declaratory and injunctive relief to remedy the constitutional deficiencies in the Secretary's procedure. Thus, plaintiff's action is barred by neither Section 205(g) nor Section 205(h). *Gainville* v. *Richardson, supra,* at 18.[6]

Plaintiff initially argues that this Court has jurisdiction under 28 U.S.C. § 1331(a),[7] providing original jurisdiction over actions arising under the Constitution, laws or treaties of the United States, where the amount in controversy exceeds $10,000. It is undisputed that the amount in controversy in this case is $1063.80. In order to meet the $10,000 amount in con-

[6] In *Johnson* v. *Robinson*, 415 U.S. 361 (1974), the Supreme Court considered the threshold issue whether 38 U.S.C. § 211(a), which prohibit judicial review of the decisions of the Administrator of Veterans' Affairs deprived the Court of jurisdiction over plaintiff's constitutional claim challenging the denial of educational benefits to conscientious objectors under the Veterans' Readjustment Act of 1966. 38 U.S.C. §§ 1651–1697. The Court held that Section 211(a) does not bar judicial consideration of questions concerning the constitutionality of veterans' benefits legislation but bars only actions seeking review of decisions of law or fact that arise in the administration of the act. To the extent Section 211(a) is similar to Section 205(h) of the Social Security Act, the analysis utilized by the Supreme Court in *Johnson* supports our conclusion that Section 205(h) does not bar judicial consideration of questions concerning the constitutionality of social security administration regulations and procedures.

[7] 28 U.S.C. § 1331(a) provides:

"(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum of value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

troversy requirement of Section 1331, plaintiff claims in her memorandum that she suffered physical and emotional distress as a result of the secretary's action. Plaintiff's amended complaint does not, however, include a request for any relief to compensate her for her suffering. Assuming arguendo, that this claim were properly before the Court, we would, nonetheless, conclude that it "appear[s] to a legal certainty that the claim is really for less than the jurisdictional amount". *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.,* 303 U.S. 283, 289 (1938); *Nelson* v. *Keefer,* 451 F. 2d 289, 292–293 (3d Cir. 1971). In addition, plaintiff can find no solace in the fact that she purports to represent a class, for the claims of the class are not of the nature which would permit their aggregation under *Snyder* v. *Harris,* 394 U.S. 332 (1969) to satisfy the jurisdictional amount requirement.[8] Thus Section 1331(a) does not confer jurisdiction in this case, in that the $10,000 amount in controversy requirement has not been satisfied.

Secondly, plaintiff asserts 28 U.S.C. § 1343(4), providing jurisdiction, without regard to amount in controversy, to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, as the jurisdictional basis of her claim. Plaintiff's claim, however, arises under the Social Security

[8] Under *Snyder* v. *Harris, supra,* aggregation of claims to satisfy the amount in controversy requirement is permissible "only (1) in cases in which a single plaintiff seeks to aggregate two or more of his own claims against a single defendant and (2) in cases in which two or more plaintiffs unite to enforce a single title or right in which they have a common and undivided interest." 394 U.S. at 335. Under this test, plaintiff argues that the members of the class have a "common and undivided interest" in the Social Security Trust Fund. We find this contention to be without merit.

Act and it has consistently been held that the Social Security Act is not an Act of Congress providing for the protection of civil rights. *Russo* v. *Kirby,* 453 F. 2d 548 (2d Cir. 1971); *McCall* v. *Shapiro,* 416 F. 2d 246 (2d Cir. 1969). Thus, this Court lacks jurisdiction over plaintiff's claim under Section 1343(4).

Plaintiff's allegation that 28 U.S.C. § 1346(a)(2)* provides jurisdiction likewise must fail. The Tucker Act confers concurrent jurisdiction in the District Court and the Court of Claims of any claim against the United States, not exceeding $10,000 in amount, founded upon the Constitution or any Act of Congress. Plaintiff seeks declaratory and injunctive relief, and this provision has been construed by the Supreme Court as authorizing only actions for money judgments and not suits for equitable relief against the United States. *Richardson* v. *Morris,* 41 U.S.L.W. 3390 (1973). Accordingly, Section 1346(a)(2) does not confer jurisdiction upon this Court.

The final jurisdictional provision under which plaintiff brings her action is the Mandamus Act, 28 U.S.C. §1361, which provides:

> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

The legislative history of the mandamus statute reveals that the statute's construction turns upon traditional mandamus law, and the Court of Appeals in *Richardson* v. *United States,* 465 F. 2d 844 (3d Cir. 1972), *cert. granted* 41 U.S.L.W. 3458 (1973), summarized the prior law:

> In order for mandamus to issue, a plaintiff must allege that an officer of the Government owes him a legal duty which is a specific, plain ministerial act "devoid of judgment or discretion". [citations omitted] An act is ministerial only when its performance is positively commanded and so plainly prescribed as to be free from doubt. 465 F. 2d at 849.

Applying these standards to the facts of the instant case, neither the provision of the Act in question nor the regulations promulgated thereunder compel the Secretary to conduct a hearing prior to the recoupment of an over-payment. While the statute and regulations are silent on this issue, they must be read in conjunction with the requirements imposed upon governmental bodies by the due process clause of the Fifth Amendment, and our examination of these provisions must be concluded in conjunction with the decisions of the Supreme Court construing the due process clause. The Mandamus Act does not distinguish between a statutory duty owed to the plaintiff by the Secretary and a constitutional duty owed by the Secretary. Whether the Secretary owes plaintiff a duty under the Fifth Amendment of the Constitution can be determined only after an analysis of the requirements of the due process clause and their application to the statutory and regulatory provisions at issue. In the instant case, plaintiff relies upon

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* 28 U.S.C. § 1346(a)(2) provides:

"(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

* * * * *

"(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

Goldberg v. *Kelly*, 397 U.S. 254 (1970), to establish the existence of the constitutional right to a prior hearing in administrative recoupment cases. She argues that *Goldberg* imposes the constitutional duty upon the Secretary to conduct a hearing prior to the adjustment or reduction of her benefits in order to recoup an over-payment and that this duty is ministerial and devoid of discretion in that it is compelled by the Constitution. The denial of the opportunity for such a prior hearing, according to plaintiff, gives rise to jurisdiction under the Mandamus Act. We agree with the Court in *Elliott* v. *Weinberger*, 371 F. Supp. 960 (D. Hawaii 1974), that the applicability of *Goldberg* and its progeny is sufficiently apparent to establish jurisdiction under Section 1361. See also *Martinez* v. *Richardson*, 472 F. 2d 1121 (10th Cir. 1973).[10]

[10] An alternative basis for sustaining jurisdiction under Section 1361 is found in *Chaudoin* v. *Atkinson* 494 F. 2d 1323 (3d Cir. 1974) where the Court of Appeals stated:

". . . a request for relief under Section 1361 requires 'the court [to] utilize all relevant legislative and other materials to determine the scope of discretion or power delegated to the officer."

In so holding, the Court relied on *Carey* v. *Local Board No. 2, Hartford, Connecticut*, 297 F. Supp. 252 (D. Conn. 1969), *aff'd.* 412 F. 2d 71 (2d Cir. 1969), where the Court held that the fact that the duty involved becomes clear only after the construction of the statute does not preclude relief under 28 U.S.C. § 1361. In so holding, the Court relied on *Roberts* v. *United States*, 176 U.S. 221 (1900), where it was stated:

"Unless the writ of mandamus is to become practically valueless, and is to be refused even where a public officer is commanded to do a particular act by virtue of a particular statute, this writ should be granted. Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law, and he must, therefore, in a certain sense, construe it, in order to form a judgment from its language what duty he is directed by the statute to perform. . . . If the law directs him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires in some degree, a construction of its language."

We read *Chaudoin* and *Carey* to permit the court to review the appropriate constitutional provisions, legislative material and judicial decisions in order to determine whether under any of these three alternatives the basis of jurisdiction is provided under the Mandamus Act. Accordingly, we must proceed to determine whether the Secretary owes plaintiff a duty under the Fifth Amendment to the Constitution and the decisions of the courts construing that Amendment to conduct a hearing prior to the adjustment of her benefits and we may assume jurisdiction under Section 1361 for the purpose of making this determination.

Also significant is the recent decision of the Supreme Court in *Christian* v. *New York State Dept. of Labor*, 414 U.S. 614 1974), where plaintiffs challenged the Unemployment Compensation for Federal Employees Program, 5 U.S.C. § 8501 *et seq.* on the ground that they were denied benefits without a prior hearing. The district court dismissed the constitutional claims against the federal defendants, and on appeal, plaintiffs attacked this ruling arguing that mandamus jurisdiction lies where the act of a federal official, although authorized by statute, is alleged to violate the Constitution, relying on *Garfield* v. *United States ex rel. Goldsby*, 211 U.S. 249 (1908). At oral argument the Solicitor General conceded jurisdiction under the Mandamus Act. The Court therefore, did not pass on this issue, despite the fact that the Court may *sponte* pass on jurisdictional questions.

II. The Class Action

In her amended complaint, plaintiff purports to represent a class consisting of "all persons eligible for Social Security OASDI benefits, and whose benefits have been or will be reduced, terminated or otherwise summarily adjusted by defendant without notice and opportunity for a prior administrative

hearing." Preliminarily, we note at the time this action was filed plaintiff was not a member of the class she purports to represent, in that her benefits had not as yet been reduced. By subsequent administrative action, however, her request for reconsideration was denied and the adjustment was scheduled for implementation. It was only by the subsequent stipulation between the parties that her benefits have been permitted to continue.

In order to establish her right to maintain a class action, it is plaintiff's burden to satisfy all of the requirements of Rule 23(a) and one of the subdivision of 23(b). *Philadelphia Electric* v. *Anaconda Brass Co.*, 43 F.R.D. 452, 457 (E.D. Pa. 1968). With respect to Rule 23(a), defendant's affidavit reveals that in 1970 there were 1,250,000 over-payment cases, from which 12,000 requests for reconsideration were filed, and 1600 requests for hearings were filed. This alone establishes that the class is so numerous that joinder of all members is impractical. The sole issue in this action is whether adjustment of social security benefits in order to recoup an over-payment may be accomplished absent a prior hearing, and this issue presents questions of law and fact common to the class. Plaintiff's claim in this respect is typical of the claims of the class. Finally, there is no issue of adequate representation, and we recognize the competency of plaintiff's counsel. Plaintiff is proceeding under Rule 23(b)(2) which concerns the request for injunctive or declaratory relief and is specifically designed for situations seeking the vindication of constitutional rights. Upon a finding that plaintiff has satisfied the requirements of Rule 23 (a) and Rule 23(b)(2), plaintiff's motion for a class action determination will be granted as modified in our order.

III. The Three-Judge Court

Plaintiff requests the convening of a three-judge court on the ground that she is challenging the constitutionality of Section 204 of the Act, 42 U.S. § 404. Plaintiff, however, does not challenge the right of the Secretary to recoup over-payments, but merely challenges the procedure by which it is done. The language of the statute is silent on the methods by which over-payments are recovered, and it specifically provides that over-payments are to be recovered "under regulations prescribed by the Secretary". Thus, plaintiff's attack is directed toward the constitutional deficiency of the regulations in failing to provide an evidentiary hearing in advance of recoupment. Under such circumstances, a three-judge court is not required, *Mills* v. *Richardson,* 464 F. 2d 995, 1001 (2d Cir. 1972) and, accordingly, plaintiff's motion for the convening of a three-judge court will be denied.

IV. The Merits

The issue before the Court, as previously indicated, is whether the failure of the regulations promulgated pursuant to Section 204 to provide an opportunity for an evidentiary hearing prior to the adjustment of security benefits in order to recoup an over-payment is (1) contrary to the purpose of the Act and (2) unconstitutional under the Fifth Amendment to the Constitution.

V. The Purpose of the Act

The general purpose of the old-age, survivor and disability insurance provisions of Title II of the Act is to protect workers and their dependents from the

risk of loss of income due to the insured's old age, death or disability. *Delno* v. *Celebreeze,* 347 F. 2d 159, 161 (9th Cir. 1965). In the event an over-payment is made, Section 204(a) of the Act authorizes the Secretary to adjust or decrease such benefits in order to recover the over-payment. Section 204(b), however, contains a provision providing for the waiver of adjustment of recovery under certain circumstances. Where an individual is found without fault and adjustment or recovery would either defeat the purpose of Title II or be against equity or good conscience, adjustment or recovery may be waived. In the regulations, 20 CFR § 404.508, "defeat the purpose of title II" means "to deprive a person of income required for ordinary and necessary living expenses."

The manifest purpose of Section 204(b) of the Act is to render more equitable the recovery of incorrect payments to individuals, and the Secretary goes to great length to justify its "paper hearings." It is conceivable that the determination that an overpayment has been made can be readily determined in an *ex parte* proceeding by the examination of Social Security records and cancelled checks. The critical question of "fault" and whether recovery would "defeat the purpose" of the Act or be "against equity and good conscience" are less susceptible to a summary determination in an *ex parte* proceeding. In her amended complaint, plaintiff alleges that she has no other source of income and is totally disabled. She further alleges that if her benefits were reduced as proposed she would be unable to provide the bare necessities of life. Considering the "compassionate" purpose of the waiver provision, it appears incongruous that its purpose would mandate that the critical determinations be made summarily on an *ex parte* basis. Rather, the pur-

pose of the Act contemplates that an individual who seeks to present evidence tending to establish the applicability of the waiver provision must be given an opportunity to do so prior to adjustment or reduction of benefits. Accordingly, we conclude that the failure of the regulations to provide a hearing prior to recoupment is contrary to the purpose of Title II of the Act.

This conclusion, however, does not end our inquiry for only a finding that the Secretary owes plaintiff a constitutional duty which is so positively commanded as to be devoid of judgment or discretion will support jurisdiction under Section 1361. We must, therefore, proceed to an analysis of the due process issue.

THE DUE PROCESS ISSUE

The requirements of procedural due process apply only to the deprivation of interests encompassed within the Fifth and Fourteenth Amendments' protection of liberty and property. *Board of Regents* v. *Roth,* 408 U.S. 564 (1972). Thus, the threshold question presented is whether the nature of plaintiff's asserted property interest is within the range of interests protected by the Due Process Clause of the Fifth Amendment. Initially, we note that plaintiff does not claim a property interest in the amount of the overpayment nor does she challenge the Secretary's right to recoup an overpayment by means of a civil suit.[11] We are con-

[11] Section 5501 of the Claims Manual provides that the Social Security Administration shall recoup overpayments by withholding benefits or by requesting the overpaid person to refund the amount in excess of the correct payment. Where waiver is not applicable and the overpaid person refuses to make a refund, Section 5503.9 of the Claims Manual provides that the Secretary should consider recovery by civil suit.

cerned solely with the monthly social security benefits to which plaintiff is entitled pursuant to 42 U.S.C. § 402(e)(1)(B)(ii). Plaintiff was found qualified by the Social Security Administration to receive disabled widow's insurance benefits on the social security record of her deceased husband. As long as she continues to satisfy the statutory requirements of the Act, plaintiff is entitled to receive benefits pursuant thereto. Plaintiff's property interest in her monthly benefits amounts to a statutory entitlement and, therefore, constitutes a property interest protected by the Due Process Clause of the Constitution.

The basic principles of due process are well established: Parties whose rights are affected are entitled to be heard; and in order that they may enjoy that right they must first be notified. *Fuentes* v. *Shevin*, 407 U.S. 67 (1972). It is equally fundamental that the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner". *Fuentes* v. *Shevin*, *supra*, at 80; *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). In the instant case, the regulations permit the adjustment of benefits following the summary reconsideration decision on the question of waiver, and they permit the implementation of the adjustment prior to an evidentiary hearing before an administrative law judge. To the extent that the regulations fail to provide an opportunity for evidentiary hearing before an administrative law judge prior to the reduction of benefits, we conclude that the procedure utilized to recoup over-payments is constitutionally deficient in that it fails to provide an evidentiary hearing "at a meaningful time". Plaintiff's benefits are a matter of statutory entitlement and may not be terminated, reduced

or otherwise adjusted absent an opportunity for a prior hearing. *Goldberg* v. *Kelly*, 397 U.S. 254 (1970).

The Secretary argues that *Goldberg* v. *Kelly*, *supra*, and its progeny are inapplicable to Title II of the Act and asserts several reasons in support of his argument. First, the Secretary contends that *Goldberg* and *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969) are distinguishable from cases arising under Title II in that the decisions in *Goldberg* (termination of welfare benefits) and *Sniadach* (garnishment of wages) were based on need. Under Title II, the question whether one is entitled to benefits has nothing to do with one's financial situation or need. *Goldberg* and *Sniadach*, however, merely emphasized the special importance of welfare benefits and wages, and they did not carve out a rule of necessity. *Fuentes* v. *Shevin*, *supra*, at 89. The Court in *Fuentes* clearly rejected the narrow interpretation that the Secretary urges us to adopt, holding:

> . . . Both decisions were in the mainstream of past cases, having little or nothing to do with the absolute 'necessities' of life but establishing that due process requires an opportunity for a hearing before a deprivation of property takes effect. (citations omitted) 407 U.S. at 88.

It is, therefore, apparent that under the present law need or necessity do not constitute the *sine qua non* upon which the right to procedural due process is founded.[12]

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[12] In his argument, the Secretary relied heavily on *Torres* v. *New York State Dept. of Labor*, 321 F. Supp. 432 (S.D.N.Y. 1971), *vacated and remanded* 402 U.S. 968 (1971), *adhered to* 333 F. Supp. 341 (S.D.N.Y. 1971) *aff'd.* 405 U.S. 949 (1972). In

Secondly, the Secretary argues that the weight of judicial authority supports his position that *Goldberg* is inapplicable to cases arising under Title II. In *Richardson* v. *Wright*, 405 U.S. 208 *rehearing denied*, 405 U.S. 1033 (1972), the Supreme Court was faced squarely with the question whether *Goldberg* applied to cases arising under the Act. In the light of new regulations adopted by the Secretary, the Court remanded the case for reconsideration under the new regulations. The Secretary relies on *Wright* for the proposition that an evidentiary hearing is not a *per se* requirement prior to the adjustment of social security benefits in order to recoup an over-payment. We believe that the Secretary is reading too much into that decision, but it is significant in that all cases decided subsequent thereto were based on the new regulations adopted by the Secretary. The Secretary also relies on *Anderson* v. *Finch*, 322 F. Supp. 195 (N.D. Ohio 1971), *remanded* 454 F. 2d 596 (1972) and *Messer* v. *Finch*, 314 F. Supp. 511 (E.D. Ky. 1970) *judgment vacated for mootness*, 400 U.S. 987 (1971), in support of his argument. These cases, however, were decided prior to *Fuentes*, and since *Fuentes*, the weight of

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Torres, the lower court upheld the constitutionality of the New York State Unemployment Compensation statutes. The Court held that *Goldberg* did not apply to unemployment compensation because the need was not a factor in that program.

Torres was decided prior to *Fuentes*, and since *Fuentes*, three-judge courts in *Pregent* v. *New Hampshire Department of Employment*, 361 F. Supp. 782 (D. [N.] H. 1973) and in *Steinberg* v. *Fusari*, 364 F. Supp. 922 (D. Conn. 1973), rejected the *Torres* rationale in the light of *Fuentes* and held that an evidentiary hearing is required prior to the termination of unemployment benefits. See also *Wheeler* v. *Vermont*, 335 F. Supp. 856 (D. Vt. 1971). The *Steinberg* case came out of the same Circuit as did *Torres* and was apparently overlooked by the Secretary.

judicial authority establishes that procedural due process requires an evidentiary hearing prior to termination or adjustment of social security benefits. *Elliott* v. *Weinberger*, 42 U.S.L.W. 2442 (D. Hawaii, Feb. 4, 1974), (hearing required prior to adjustment of social security benefits in order to recoup an over-payment); *Eldridge* v. *Weinberger*, 361 F. Supp. 520 (W.D. Va. 1973) (hearing required prior to termination of social security benefits); *Williams* v. *Weinberger*, 360 F. Supp. 1349 W.D. Ga. 1973) (hearing required prior to termination of social security benefits). But see *Jarbo* v. *Weinberger* 374 F. Supp. 310, (D.W. Wash. 1973).

Finally, the Secretary argues that a pre-recoupment trial type hearing would impose an insuperable burden upon the Title II program. In support of this argument, the Secretary notes that in 1970 there were 1,250,000 over-payment cases and alludes to the financial and administrative burden involved. Such burden cannot override plaintiff's manifest due process right to a prior hearing. The Supreme Court in *Goldberg* and *Fuentes* has specifically rejected this argument where a hearing is clearly required by the Due Process Clause. Moreover, the Court in *Eldridge* v. *Weinberger, supra*, at 525–527, specifically rejected this argument in the context of a social security case. *See also Richardson* v. *Wright, supra* at 223–226 (Brennan, J., dissenting); *Elliott* v. *Weinberger, supra*. A prior hearing always imposes some costs in time, effort and expense, but these costs cannot outweigh the constitutional right to such a hearing. *Fuentes* v. *Shevin, supra*, at 90 n.22.

We conclude that the Secretary owes plaintiff a constitutional duty to afford an opportunity for an evi-

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dentiary hearing prior to the adjustment of social security benefits in order to recoup an overpayment. This duty, arising out of the Due Process Clause of the Fifth Amendment, is so positively commanded by the cases construing that amendment as to be free from doubt. Accordingly, our conclusion in this respect supports our jurisdiction under the mandamus statute, 28 U.S.C. § 1361.

Once it is determined that the protection of due process applies, the next consideration is what due process safeguards are required. It is at this point that due process is flexible to the extent that only such procedural protection is required as a particular situation demands. *Morrissey* v. *Brewer,* 408 U.S. 471 (1972). Consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the governmental function involved as well as the private interest that has been affected by governmental action. *Cafeteria & Restaurant Workers Union* v. *McElroy,* 367 U.S. 886, 895 (1961). In balancing the interest of the respective parties, we now become more sensitive to defendant's argument of administrative burden. Plaintiff does not seek to have us impose the full panoply of procedural safeguards upon the Secretary, rather she seeks only an opportunity to present her case at a hearing prior to any adjustment of her benefits. Accordingly, our consideration of this case will be so limited. We hold that a recipient of social security benefits is entitled by the Due Process Clause of the Fifth Amendment to an opportunity to a hearing prior to the adjustment of his social security benefits in order to recoup an overpayment. The recipient must be accorded notice of his right to a hearing in a conspicuous manner and given sufficient time to exercise this right. We do not hold

that a hearing must be held in every case, in that a voluntary, intelligent and knowing waiver of the right may obviate the need for a hearing. This, of course, presupposes adequate notice of the right to a hearing. Moreover, we see no reason why the opportunity for a hearing cannot be afforded within the present procedural framework of the Social Security Administration. The procedures followed in a general determination of qualification to Title II benefits as followed in this case need not be varied except to suspend the implementation of the adjustment of benefits until an opportunity for a hearing is afforded.

For the foregoing reasons, defendant's motion for summary judgment will be denied and plaintiff's motion for summary judgment will be granted.

ORDER

AND NOW, this 30th day of April, 1974, IT IS ORDERED that:

1. defendant's motion to dismiss the complaint for lack of jurisdiction is DENIED;

2. plaintiff's motion for a class action determination is GRANTED; the class consisting of all persons eligible for Social Security OASDI benefits within the counties encompassed by the Eastern District of Pennsylvania, whose benefits may be terminated, reduced or otherwise adjusted in order to recoup an over-payment;

3. plaintiff's motion for the convening of a three-judge court is DENIED;

4. defendant's motion for summary judgment is DENIED; and

5. plaintiff's motion for summary judgment is GRANTED.

[s] E. MAC TROUTMAN.
J.

APPENDIX D

I. Pertinent provisions of the Social Security Claims Manual

Section 5503(a) provides in pertinent part:

> When it is determined that an incorrect payment has been made, the person liable should be notified in writing (see § 5508 for sample letters). The notice will inform the person of:
>
> "(1) The incorrect payment made, how, and when it occurred. (If the overpayment resulted from the entitlement of another beneficiary, the adversely affected individuals(s) must be informed of the name, relationship to the WE, and basis for entitlement of the new beneficiary.)
>
> "(2) The right to request reconsideration of the overpayment determination.
>
> "(3) The required recovery.
>
> "(4) The proposed adjustment or the demand for repayment where adjustment is not possible.
>
> "(5) The waiver provisions of the law (Social Security Act, secs. 204(b) or 1870(c)).
>
> "(6) The availability of partial adjustment or partial refund.
>
> "(7) The need to notify the DO promptly if he feels that the circumstances in his case would justify waiver, partial adjustment, or partial refund."

Section 5503.3 provides in pertinent part:

> Delay in Withholding Benefits to Recover Overpayments. Before we start to adjust the overpayment against the benefits due a beneficiary, he or his payee will normally be given rea-

sonable opportunity to contest the correctness of the determination or to establish that a basis exists for waiver or partial adjustment. The notice to the beneficiary will advise him that adjustment will be deferred for a longer period when the facts in a given case, including but not limited to time case is being worked, cutoff dates, mailing time, etc., indicate that a 30-day period would be inadequate for consideration of the matter and reply by the beneficiary and reviewing office processing time.

The only exceptions to this rule are:

"(1) the overpayment is based on an annual report by the beneficiary; [*] or

[* The Social Security Administration now provides the 30-day deferral period to this class of beneficiaries also]

"(2) the overpayment results from the superendorsement procedures under Section 205 (n) of the Act whereby payment of a combined check is made to the survivor . . . In the above two situations immediate adjustment action is taken."

Section 5503.5 provides in pertinent part:

If the person responds raising some question about the correctness of the determination of overpayment, or raises a question about recovery, waiver or partial adjustment, the DO will obtain the necessary evidence and prepare a recommendation to the reviewing office for disposing of the case. *Thus, if the person liable requests reconsideration of the substantive determination and it appears that the determination will be affirmed, the DO will develop the possibility of waiver of adjustment or recovery of the overpayment at the same time it receives evidence to resolve the request for reconsideration. This is necessary since, if the substantive determination is affirmed the Reconsideration Determination will cover both*

issues (§ *8737*). Where reconsideration of the overpayment determination, waiver, or partial adjustment development is initiated, withholding to recoup the overpayment will be further deferred and payment will be continued until development has been completed, if the beneficiary is otherwise entitled to benefits. If development will not be completed before the expiration of the 30-day period, the DO will utilize teletype to advise the reviewing office. (Emphasis in original)

II. Pertinent provisions of the Code of Federal Regulations, Title 20

20 C.F.R. Part 404 provides in pertinent part:

§ *404.907 Notice of initial determination.*

Written notice of an initial determination shall be mailed to the party to the determination at his last known address, except that no such notice shall be required in the case of a determination that a party's entitlement to benefits has ended because of such party's death (see § 404.905(d)). If the initial determination disallows, in whole or in part, the application or request of a party, or if the initial determination is to the effect that a husband, widower, or parent was not receiving the requisite support from an insured individual, or that a party's entitlement to benefits has ended, or that a reduction, deduction, or adjustment is to be made in benefits or a lump sum, or that a period of disability established for a party has terminated, the notice of the determination sent to the party shall state the basis for the determination. Such notice shall also inform the party of the right to reconsideration (see § 404.910). Where more than the correct amount of payment has been made, see § 404.502a.

[37 F.R. 10554, May 25, 1972]

§ 404.908 Effect of initial determination.

The initial determination shall be final and binding upon the party or parties to such determination unless it is reconsidered in accordance with §§ 404.910–404.916, or it is revised in accordance with § 404.956.

§ 404.909 Reconsideration and hearing.

Any party who is dissatisfied with an initial determination may request that the Administration reconsider such determination, as provided in § 404.910. If a request for reconsideration is filed, such action shall not constitute a waiver of the right to a hearing subsequent to such reconsideration if the party requesting such reconsideration is dissatified with the determination of the Administration made on such reconsideration; and a request for a hearing may thereafter be filed, as is provided in § 404.917.

[25 F.R. 1677, Feb. 26, 1960, as amended at 28 F.R. 14492, Dec. 31, 1963]

§ 404.910 Reconsideration; right to reconsideration.

The Administration shall reconsider an initial determination if a written request for reconsideration is filed, as provided in § 404.911, by or for the party to the initial determination (see § 404.905). The Administration shall also reconsider an initial determination (unless the determination is with respect to the revision of the Administration's earnings records) if a written request for reconsideration is filed, as provided in § 404.911, by an individual as a wife, widow, divorced wife, surviving divorced wife, surviving divorced mother, husband, widower, child, parent, individual alleging equitable entitlement to a lump sum, or representative of a decedent's estate, who makes a showing in writing that his or her rights with respect to monthly benefits, a lump sum, a

period of disability, or entitlement to hospital or supplementary medical insurance benefits, may be prejudiced by such determination. The Administration shall also reconsider an initial determination relating to the revision of the Administration's record of the earnings (see § 404.905(g)) of a deceased individual if a written request for reconsideration is filed, as provided in § 404.911, by a person as a widow, divorced wife, surviving divorced wife, surviving divorced mother, widower, child, parent, an individual alleging equitable entitlement to a lump sum, or representative of the decedant's estate.

[31 F.R. 16766, Dec. 31, 1966]

§ 404.911 Time and place of filing request.

The request for reconsideration shall be made in writing and filed at an office of the Administration or, in the case of an individual in the Philippines, at the Veterans' Administration Regional Office in the Philippines or, in the case of an individual having 10 or more years of service in the railroad industry (see Subpart O of this Part 404) or of an individual entitled to an annuity on the basis of an award under the Railroad Retirement Act prior to October 30, 1951, who requests in writing reconsideration with respect to his application to establish a period of disability under section 216(i) of the act, at an office of the Railroad Retirement Board, within 6 months from the date of mailing notice of the initial determination, unless such time is extended as provided in § 404.612 or § 404.953.

[25 F.R. 6468, July 9, 1960, as amended at 28 F.R. 14492, Dec. 31, 1963]

§ 404.912 Parties to the reconsideration.

The parties to the reconsideration shall be the person who was the party to the initial deter-

mination (see § 404.905), and any other person referred to in § 404.910 upon whose request the initial determination is reconsidered.

§ 404.913 Notice of reconsideration.

If the request for reconsideration is filed by a person other than the party to the initial determination, the Administration shall, before such reconsideration, mail a written notice to such party at his last known address, informing him that the initial determination is being reconsidered. In addition, the Administration shall give such party a reasonable opportunity to present such evidence and contentions as to fact or law as he may desire relative to the determination.

[25 F.R. 1677, Feb. 28, 1960, as amended at 28 F.R. 14492, Dec. 31, 1963]

§ 404.914 Reconsidered determination.

The Administration shall, when a request for reconsideration has been filed, as provided in §§ 404.910 and 404.911, reconsider the initial determination in question and the findings upon which it was based; and upon the basis of the evidence considered in connection with the initial determination and whatever other evidence is submitted by the parties or is otherwise obtained, the Administration shall make a reconsidered determination affirming or revising, in whole or in part, the findings and determination in question.

[25 F.R. 1677, Feb. 28, 1960, as amended at 28 F.R. 14492, Dec. 31, 1963]

§ 404.915 Notice of reconsidered determination.

Written notice of the reconsidered determination shall be mailed to the parties at their last known addresses. The reconsidered determination shall state the basis therefor and inform

the parties of their right to a hearing (see § 404.917).

§ 404.916 Effect of reconsidered determination.

The reconsidered determination shall be final and binding upon all parties to the reconsideration unless a hearing is requested in accordance with § 404.918 and a decision rendered or unless such determination is revised in accordance with § 404.956.

§ 404.917 Hearing; right to hearing.

An individual has a right to a hearing about any matter designated in § 404.905, if:

(a) An initial determination and a reconsideration of the initial determination have been made by the Administration; and

(b) The individual is a party referred to in § 404.919 or § 404.920; and

(c) The individual has filed a written request for a hearing under the provisions described in § 404.918.

[31 F.R. 16766, Dec. 31, 1966]

III. Pertinent Statutory Provision

42 U.S.C. 404:

OVERPAYMENTS AND UNDERPAYMENTS

(a) Whenever the Secretary finds that more or less than the correct amount of payment has been made to any person under this subchapter, proper adjustment or recovery shall be made, under regulations prescribed by the Secretary, as follows:

(1) With respect to payment to a person more than the correct amount, the Secretary shall decrease any payment under this subchapter to which such overpaid person is entitled, or shall require

such overpaid person or his estate to refund the amount in excess of the correct amount, or shall decrease any payment under this subchapter payable to his estate or to any other person on the basis of the wages and self-employment income which were the basis of the payments to such overpaid person, or shall apply any combination of the foregoing. A payment made under this subchapter on the basis of an erroneous report of death by the Department of Defense of an individual in the line of duty while he is a member of the uniformed services (as defined in section 410(m) of this title) on active duty (as defined in section 410(*l*) of this title) shall not be considered an incorrect payment for any month prior to the month such Department notifies the Secretary that such individual is alive.

(2) With respect to payment to a person of less than the correct amount, the Secretary shall make payment of the balance of the amount due such underpaid person, or, if such person dies before payments are completed or before negotiating one or more checks representing correct payments, disposition of the amount due shall be made in accordance with subsection (d) of this section.

(b) In any case in which more than the correct amount of payment has been made, there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.

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